By the Honble Lord Swinton
formerly one of the Senators
of the College of Justice: now Dead

CONSIDERATIONS

CONCERNING A

PROPOSAL

FOR

DIVIDING THE COURT OF SESSION INTO CLASSES OR CHAMBERS;

AND FOR

LIMITING LITIGATION IN SMALL CAUSES;

AND FOR

THE REVIVAL OF JURY-TRIAL IN CERTAIN CIVIL ACTIONS.

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CHAPTER I.

Concerning the dividing of the COURT *of* SESSION *into* CLASSES *or* CHAMBERS.

IN a Paper, whereof a few copies were printed at Edinburgh in January 1787, intitled, *Suggeſtions for ſome Reformation in the Form of Proceſs before the Court of Seſſion*, it is, among other things, propoſed, "That for deciding "the more important cauſes, the whole Court "ſhould meet only upon three of the ſede-"runt-days in each week; and for deciding "cauſes of leſſer importance, only half of the "Judges ſhould meet alternately on the two "remaining ſederunt-days, reckoning each "half a ſeparate and diſtinct Chamber for the "buſineſs coming before them."

It is here propoſed to conſider more at large the ſubject which gave riſe to the ſuggeſtion now ſtated. But in order to be underſtood, it is neceſſary to premiſe ſome general account of the inſtitution of the Court of Seſſion, and of the manner and form of carrying on buſineſs in it.

The old *Court of Seſſion*, which was eſtabliſhed by James I. of Scotland in 1425, was ſuperſeded by the Court called *the Daily Council*, inſtituted by James IV. in 1503.

In place of both theſe Courts, James V. inſtituted the preſent Court of Seſſion, under the name of *the College of Juſtice*. And although in the later editions of the Scots acts of Parliament this inſtitution is ſtated to have been made in the year 1537, it appears from the old edition of our ſtatutes, commonly called the *Black Acts*, and variety of other evidence, that the real date of the eſtabliſhment of this Court was in the year 1532.

By the 36th act of that King's reign, (as numbered in the later editions), intitled, *Inſtitution of the College of Juſtice*, reciting, That his Majeſty was deſirous to have a permanent order of juſtice for the univerſal weal of all his lieges, "it is ordained, That there "be choſen certain perſons maiſt convenient "and qualified therefor, to the number of "fourteen perſons, halfe ſpiritual halfe temporal, with ane preſident; the quhilkis "perſons ſall be authoriſed in this preſent "Parliament, to ſit and decide upon all actions civil, and nane others to have vote "with them, until the time the ſaid College "may be inſtitute at mair leiſure."

By the 40th act of the ſame year, intitled, *The authority of the Chancellor and Lords*, "It "is provided, That the Lord Chancellor be-

"ing

" ing preſent, ſhall have vote and be principal " of the ſaid Council, and ſicklike other Lords " as ſhall pleaſe the King's Grace to join to " them, to have votes ſicklike, to the number " of three or four." Theſe were called extraordinary Lords, and generally were Peers.

By the 43d act of the ſame year, authority was given to the Chancellor, Preſident, and Lords of Seſſion, " to adviſe, counſel, and " conclude upon ſik rules, ſtatutes, and or- " dinances, as ſhall be thought by them expé- " dient to be obſerved and keeped in their " manner and order of proceeding at all " times."

Theſe ordinances or acts of ſederunt form a code of laws relative to the form of proceſs.

Originally this Court alſo had a ſovereign juriſdiction; ſo that, except where the Judges went beyond their proper juriſdiction, their decrees were final, and without appeal to King and Parliament *.

Soon after the abolition of Popery, an act of Parliament being made †, enacting, That miniſters ſhould not be judges, the ſpiritual half of the Court was laid aſide, and the whole number was made up of laymen, the quorum whereof was declared to be nine.

By the 93d act of the 6th Parliament of James VI. the preſentation of proper perſons to fill the vacant places in the Court of Seſſion, is declared to belong to the King; but that the

* See Lord Stair, lib. 4. tit. 1. § 22. 55. 56. &c. † 1584. c. 133.

Court had the power of rejecting the perſons preſented, if upon examination and trial they ſhould be found unqualified.

Great abuſes having crept into the form of proceſs, Charles II. in 1669 granted commiſſion to certain Noblemen and others of his Privy-Council and Seſſion, to inquire into theſe abuſes, and to propoſe rules and orders for their remedy. This was done; and many excellent regulations were deviſed, which in the year 1672 were approved of by Parliament, and paſſed into an act which bears the name of the Regulations of 1672.

For the like reaſons, by the 34th act of the 4th ſeſſion of King William and Queen Mary's firſt Parliament in 1693, commiſſion was granted to ſuch perſons as ſhould be nominated by their Majeſties, to take an account of all abuſes practiſed in the diſpenſation of juſtice, and to form farther rules and regulations concerning the ſame, for his Majeſty's approbation. This was alſo done accordingly; and in the year 1695 and 1696 theſe rules received his Majeſty's approbation.

And thus matters ſtood at the time of the Union between England and Scotland in 1707; when the Scots, deſirous to preſerve to themſelves their own particular laws in matters civil and criminal, and alſo their peculiar forms of proceſs, did, in the Articles of Union, expreſsly ſtipulate, *inter alia*, "That the Court "of Seſſion or College of Juſtice do, after the

"Union,

" Union, and notwithſtanding thereof, re-
" main in all time coming within Scotland, as
" it is now conſtituted by the laws of that
" kingdom, and with the ſame authority and
" privileges as before the Union; ſubject, ne-
" vertheleſs, to ſuch regulations for the better
" adminiſtration of juſtice as ſhall be made by
" the Parliament of Great Britain."

By act 10th Geo. I. cap. 19. an alteration was made upon the manner of chuſing and preſenting the Lords of Seſſion, directed by the above-mentioned act of James VI. in 1584, namely, The power of rejecting the Crown's preſentee was taken from the Court, leaving to them only the liberty, in caſe upon trial and examination they ſhould think him not qualified, of certifying the whole matter to his Majeſty, who may thereafter ſignify his pleaſure to the Court.

The ſame act directs, That when the places of the preſent four Extraordinary Lords ſhould become vacant, no nomination ſhould be made to ſupply ſuch vacancy. Accordingly, no extraordinary Lords have been nominated ſince that time.

So much for the inſtitution and general hiſtory of the Court.

As to the forms of proceeding. In general, cauſes are brought into Court by advocation, or by ſuſpenſion, or by ordinary action, or by petition and complaint.

Advocations

Advocations are complaints of the interlocutors and proceedings of ſheriffs-depute, or other inferior judges, before a final decree.

Suſpenſions, in general, are complaints of the final ſentences or decrees of inferior judges; and both kinds are brought by way of appeal to the Court of Seſſion. But, before advocations or ſuſpenſions are admitted to receive an entire new trial in that Court, they are brought by bill or petition before one of the Judges in the Court, who, during his turn of officiating on that duty, is called *The Lord Ordinary upon the Bills:* And if he be of opinion, that there is ſuch competency and relevancy in the allegations contained in the bill of advocation or of ſuſpenſion, as to merit the cognizance of the Court, he paſſes the bill; but generally with this condition in ſuſpenſions, that the ſuſpender ſhall previouſly find caution, that is, a ſurety for his paying the debt if judgement ſhall go againſt him. Upon theſe bills being paſſed, writs in the King's name, called *Letters of Advocation or of Suſpenſion* are iſſued, ſtating the whole caſe and reaſons, and containing warrant for ſummoning the adverſe party; and theſe writs being brought into Court, the cauſe is tried in the ſame manner as if it had come originally before the Court. If the Lord Ordinary refuſes the bill in the caſe of advocations, the cauſe returns to be finiſhed in the reſpective inferior courts. In the caſe of ſuſpenſions, the refuſal of the bill puts an end to the

the cauſe, and the ſentence of the inferior judge may be put to execution: but both in the caſe of advocations and of ſuſpenſions, where the bill is refuſed, if any of the parties be diſſatisfied with the judgement of the Lord Ordinary, he may apply for a review thereof by petition to the whole Court.

This duty upon the bills goes round the whole Judges except the Preſident, each taking it for a week in turn through the whole year, as well in time of Vacation as in time of Seſſion.

Ordinary actions are ſuch as come originally into the Court, without having been brought before any of the inferior judges in the firſt inſtance. Theſe actions are brought by a writ in the King's name, called a *Summons*, which ſtates the whole claim of the purſuer, with the grounds and reaſons thereof, and contains a warrant for citing the defender to appear, and to ſtate his defences.

The Court, as has been ſaid, now conſiſts of fifteen Judges beſides the Lord Chancellor, who, by the nature of his office in England, is prevented from any attendance here. Fourteen of them, including the Preſident, ſit together in the Inner-Court-houſe, while one ſits in the Outer-Court-houſe; each of the Ordinary Lords in turn taking that duty for a week in time of Seſſion; during which week, the Judge officiating is called *The Ordinary in the Outer Houſe.*

Before

Before this Lord Ordinary all advocations, ſuſpenſions, and ordinary actions are firſt heard, being called over according to a roll made up in the beginning of each week. It is his duty, firſt to hear the Advocates *viva voce*, and to decide upon the competency or relevancy of theſe cauſes, or to admit the allegations of parties to proof: and in the courſe of proceeding, written *Condeſcendences* (viz. Declarations) of the ſpecial facts alledged, or *Memorials* in writing upon points of law, are ordered by him, as he ſees fit; or he may report the cauſe to the Inner Houſe, for whoſe uſe he orders *Informations* in writing to be prepared.

Each of the Ordinary Lords have alſo a by-hour once a-week at a ſide-bar in the Outer Houſe, between nine and ten o'clock in the morning, before the Court meets, as well as five ſupplemental days, by a late regulation, for carrying on procedure in the cauſes which have been originally brought before them while Ordinaries in the Outer Houſe; for every cauſe remains with the reſpective Judge before whom it originally came, until he pronounce his final judgement therein, or report the cauſe, as above mentioned, to the Inner Houſe.

If parties are not ſatisfied with the firſt judgement of the Lord Ordinary, they reſtate the matter to him in written repreſentations, one or more, to which, by his allowance, written anſwers are made, which are ſometimes followed by replies, duplies, &c. all in writing;

ting. Thus the ſeveral Judges carry on as it were fourteen ſeparate Courts; and when parties do not reſt ſatisfied with their judgements, which is the caſe far too often, they may apply for a review by reclaiming petition to the whole Court, which may either refuſe the petition or appoint it to be anſwered. When the anſwers are put in, the cauſe then goes to a certain roll called the long roll, and from that roll a competent number of cauſes are taken weekly, or oftener, and ſet down in a ſhort roll, to be judged of daily by the whole Court. Again, if the parties think themſelves aggrieved by the firſt judgement of the whole Court, they may apply by a ſecond petition for a review; and if the ſecond judgement of the Court ſhall adhere to the firſt, the ſentence becomes final, and the only remedy remaining to the party is an appeal to the Houſe of Lords.

Having given this account of the inſtitution of the Court of Seſſion, and of the manner and form of carrying on buſineſs in it; before entering upon a propoſal for making material alterations on that form, it may be obſerved, that nothing is more true, than that all innovations upon ancient ſyſtems ought to be watched with the utmoſt jealouſy, as they often produce unforeſeen evils, greater perhaps than thoſe they are intended to remedy. A veneration for ancient cuſtoms, natural to the minds of men, creates an additional obligation with them, from which, if they are once ſet looſe,

it is oft-times a difficult taſk again to reduce them to ſyſtem, and to keep them in it.

But, on the other hand, it muſt be admitted, that if ſocieties of men are to be confined for ever to travel in the track of ancient conſuetude, it would be a bar to all manner of improvement; particularly matters of juſtice could be adminiſtered only in aſſemblies of the whole people, or in ſuch *pye-powder* or *boor-law* courts as may be ſuppoſed to have been eſtabliſhed in the rude beginnings of each particular ſociety.

The Roman hiſtorian informs us, that in the early ages of Rome, that wiſe people ſent three deputies to Athens, and directed them, *inclytas leges Solonis deſcribere, et aliarum Greciæ civitatium inſtituta, mores, juraque, noſcere* *.

From the report of theſe deputies were compoſed the Twelve Tables, the origin of the laws, which governed the greateſt nation that ever exiſted upon this globe. From time to time theſe laws were improved; and indeed every year the Prætor publiſhed a form of proceſs accommodated to the times, and according to which he was to adminiſter juſtice during the continuance of his office.

With us in Scotland, as anciently in England, the King's grand juſticiar had both a criminal and civil juriſdiction; and in the exerciſe of both kinds he had the aſſiſtance of juries.

* Livy, b. 3. cap. 31.

From

From the account above given, it appears, that James I. had inſtituted a *Court of Seſſion* in 1425; and James V. had inſtituted the *Daily Council* in 1503: But that James V. not ſatisfied with any of theſe judicatories, inſtituted, in 1532, the preſent College of Juſtice; and having many connections with France, and no cordiality with England, our ſiſter kingdom, whoſe conſtitution of laws were much more ſimilar to ours, he thought fit to borrow from the parliament of Paris certain forms of adminiſtrating juſtice, and to make them part of his new inſtitution. This compoſition, as might well be ſuppoſed, has not been delivered down to us in its original ſtate, but has undergone many material changes.

In the firſt place, James's court conſiſted one half of clergymen, with four extraordinary Lords, who were generally Peers; but ſoon after our happy Reformation from Popery, an act of parliament was paſſed, in 1584, enacting, "That miniſters ſhould not be judges;" which at one ſtroke changed the half of the judges in James V.'s judicatory, (for one half of them were to be ſpiritual men), and ſubſtituted in their place laymen, educated in the knowledge and practice of the law. This was a good exchange for the loſs of that benefit of clergy.

It was our cuſtom alſo, as obſerved by Lord Stair, b. 4. t. 46. to exclude parties and their counſel from being preſent at the taking of the teſtimonies of witneſſes. It appears James V.

muſt have borrowed this alſo from the parliament of Paris: For Mr Legier, in his treatiſe, *Sur les procedures de L'Enclos du Palais*, p. 251. informs us, that all proofs were taken by inqueſt, (a ſort of precognition or pre-inquiry), in preſence only of the judge deputed for that purpoſe, and the clerk. But the Scots parliament, in 1686, cap. 18. aboliſhed this practice, for the reaſons mentioned by Lord Stair in the place above referred to. And the act 1693, cap. 26. aboliſhed the cuſtom of adviſing cauſes with ſhut doors, and admitted all parties, and their counſel, to be preſent at the deliberations of the Court.

The parliaments of Scotland alſo made other great variations upon the forms of proceedings from time to time, particularly the regulations in 1672, and farther regulations in 1695.

The *Claim of Rights* in 1689 declared the right and privilege of the ſubjects to appeal to King and Parliament againſt all ſentences of the Court of Seſſion, without diſtinction.

It is true, the articles of Union in 1707 did particularly ſtipulate, "That the Court of Seſ-
"ſion, and College of Juſtice, ſhould, after the
"Union, and notwithſtanding thereof, remain
"in all time coming within Scotland, as it is
"now conſtituted by the laws of that king-
"dom, and with the ſame authority and pri-
"vileges as before the Union." The object of this article was no doubt a very proper one, namely, to preſerve our own laws, and prevent the introduction of forms of proceeding inconſiſtent

conſiſtent with our laws. But that this clauſe might not prevent ſuch improvements as our laws and forms might have received, had there never been any union of the two kingdoms, this important addition is made to the article, viz. "That the Court ſhould be ſubject, nevertheleſs, to ſuch regulations for the better adminiſtration of juſtice as ſhall be made by the parliament of Great Britain." And accordingly, by an act of the 10th Geo. I. chap. 19. by way of ſupplement to the act above mentioned, in 1584, excluding James V.'s clergymen from the Court, his four extraordinary Lords were alſo cut off. For the act directs, "That when the places of the then preſent four extraordinary Lords ſhould become vacant, no nomination ſhould be made to ſupply ſuch vacancy." And in conſequence no extraordinary Lords have been nominated ſince that time. Though theſe extraordinary Lords were nominated by the King, from among the nobility, yet experience has not ſhown that this change has leſſened the dignity, or been attended with any diſadvantage to the buſineſs of the Court. One other article only in the forms of our proceedings, which we had from France, and that too an article anciently thought to be of no ſmall importance, ſhall be touched upon; and that is, the general cuſtom of ſolicitation; a cuſtom which is ſaid to be prevalent in France to this hour. So late as the year 1632, that cuſtom was not only permitted, but in a certain degree authoriſed by the regulations

of

of the Court. For by an act of ſederunt, of 12th June in that year, it was ordained, "That all "parties having actions depending before the "Lords, and coming to ſolicit or give them in- "formation, ſhall for that effect come to their "houſes, at any time betwixt two in the after- "noon and ſeven at night; which time the "Lords have allotted for receiving the ſaid in- "formations," &c. "And for the better ob- "ſerving hereof, to the effect that parties in "diſcretion may be moved to abſtain from im- "portuning the Lords at undue times, they "ordain, That whatſoever Lord ſhall admit any "informer or ſolicitor within his houſe, or re- "ceive any information after ſeven hours at "night, or in the morning, ſhall loſe and for- "feit his *ſederunt* (that is, a proportion of his "ſalary) for that day, to accreſce to the rema- "nent Lords, obſervers of this ſtatute."

This diſgraceful cuſtom was afterwards abo- liſhed by ſeveral acts of ſederunt, particularly the act of the 6th November 1677, and of the 11th of November 1690. The firſt of theſe acts ſets forth, "That ſuch ſolicitations were made uſe of by parties to get favour by the credit and moyen of themſelves or their friends interpoſing with the Lords, under pretence of giving information; and therefore it was en- acted and declared, That the receiving of ſuch ſolicitation, or verbal information, ſhould be a relevant reaſon of declinator againſt the Judges who admitted of the ſame; and certain fines were to be impoſed upon the parties who of-

fered

fered ſuch ſolicitations, according to the rank and degree of the offender. And the act not having been duly obſerved, it was revived and confirmed by the after acts in 1690; and the then preſent Lords engaged upon their honour to obſerve the ſame.

Another act, of 29th November 1690, for preventing all occaſion or pretence of giving informations perſonally, appointed boxes to be placed in the Seſſion-houſe for receiving of petitions and informations.

The due adminiſtration of juſtice has ſurely not ſuffered by the abolition of this part of the ancient form of proceſs, which, did it not appear on record, would not at this day have been credible.

The abolition of juries, and the taking of proofs in writing and by commiſſion, which will be treated of in an after part of this Paper, with ſeveral other cuſtoms, we owe to the ſame French extraction. The origin indeed is high; but after the examples which have been given, it will neither be thought improper, nor diſreſpectful to antiquity, to alter other inſtitutions which we derive from thence, or to new model ſuch of them as ſhall be thought neceſſary to be altered, for the better adminiſtration of juſtice.

In ſhort, conſidering the great difference between the political ſyſtems of France and thoſe of this kingdom, it may be thought, that our courts of judicature will never be completely ſound till every drop of French blood ſhall be purged

purged away, and discharged from their constitution. And this is an observation which the French themselves, in their present humour, would not take much amiss.

The remarks which have been made lay the foundation for considering the present Proposal for dividing the Court of Session into Classes or Chambers; concerning which three several questions will fall to be considered.

The *first* is, Whether the presence of the whole fifteen Lords of Session, or at least of nine of them, which is their quorum, be absolutely necessary for the determining the whole questions that come before the Court?

The *second* is, Whether that part of our form does not occasion great obstruction and delay in the administration of justice?

Supposing the first of these questions shall be answered in the negative, and the second in the affirmative, the *third* question will be, Whether, by way of remedy, it would not be proper to divide the Court into classes or chambers? and in what mode or form that may best be accomplished?

It will be understood, from the account above given, that the Court of Session includes in its jurisdiction the powers of a court of common law in matters of law, the powers of a Chancellor in matters of equity, and the powers of a jury in the trying of facts. Whether that combination has good or bad effects, is not matter of the present inquiry, which is only to discuss the three questions above stated; and upon

upon the firſt of them it muſt at firſt ſight appear, that a queſtion of law or equity may be as well tried and decided by three or four Judges, as by three or four hundred. Law is a ſcience; and if men are duly educated to it, and have practiſed the profeſſion of it, which muſt be ſuppoſed to be the caſe of Judges, they carry their knowledge about with them; and the fact being properly laid before them, they have only to apply their knowledge of the law to it, in order to produce a judgement. If Judges were to be ſuppoſed ignorant of the law, and that they had to ſtudy and learn it in every new caſe, perhaps there might be better reaſon for giving them the aid of numbers; but ſurely, in general, among any three or four men, properly choſen from the profeſſion, there is ſkill enough, and law enough, to judge and decide, almoſt in any queſtion whatever. Beſides our written law, there are in moſt caſes precedents for guiding the opinions of Judges; and where any new or unprecedented caſe ſhall happen to occur, it may be very proper to aſſume a greater number, as is ſaid to be the practice in England, where in ſuch caſes the whole Twelve Judges from the three different ſuperior courts do in their diſcretion meet and confer together.

Beſides knowledge in law, the only other requiſite in a Judge is integrity. In this regard, it does not appear that the addition of number to any judicatory encreaſes its ſtock of inte-

grity. Such addition has ſometimes been obſerved to have the contrary effect, and in ſome degree to convert a court of judicature into an aſſembly for election. A great number of Judges feel themſelves leſs reſponſible than a ſmaller number: and they really are ſo; for the increaſe of number certainly diminiſhes the reſponſibility of the individuals; and ſometimes they are even apt to lean upon one another: for a number of Judges judging together are not like a number of perſons bearing a common load, which they do not make lighter to one another, but ſometimes the reverſe; for a great number judging together are liable to altercations, and are more fitted for debate than for deciſion. Suppoſing two parties having a law-ſuit depending before the fifteen Lords of Seſſion, come to an opinion, that it is wiſer, and leſs expenſive, to ſettle the matter in diſpute by amicable reference and arbitration: Would it ever enter into their imagination to name fifteen arbiters, or even to exceed the number of two or three men of ſkill and impartiality? So wild a thought as a reference to fifteen arbiters, it is believed, never entered into any perſon's imagination.

Our neighbours, the Engliſh, have a Court of Chancery, where there is but one Judge: their three ſuperior courts, of King's-bench, Common Pleas, and Exchequer, conſiſt but of four Judges each. It will ſurely be admitted, that they are a wiſe and prudent people, and would

would not truſt their property to the determination of ſo ſmall a number of Judges in each of theſe Courts, did they find a greater number neceſſary.

It may be ſaid, no doubt, that the three Courts laſt mentioned are under the check and counterpoiſe of juries; but to this there are two good anſwers. The firſt is, That in all queſtions of law, and where there are no diſputed facts, juries have no concern, and the Judges are perfectly uncontrouled by them; and ſuch queſtions, ariſing upon the conſtruction of deeds or contracts, rights of ſucceſſion, and the like, are frequently of the greateſt value. The objection, therefore, goes only to jury-caſes, not to queſtions of law; which, though no other change were to be made, ought certainly to be confined to a ſmaller number than the preſent number of the Judges. The ſecond anſwer is, That in jury-caſes, particularly in queſtions depending on parole-evidence, eſpecially queſtions of fraud, ſlander, and the like, which are of a criminal kind, why not give the Court a diſcretionary power to try them by juries, as in England?

It has indeed been alledged, and probably with juſtice, that it was in the view of ſuperſeding the neceſſity of juries, which anciently tried civil as well as criminal caſes in Scotland, that ſo great a number of Judges as fifteen, or rather nineteen, were made to compoſe the judicatory of James V. and that the Court of

Seſſion ought to be conſidered as poſſeſſing the double character of both Judges and Jurymen, and their number, therefore, in that light ought not to be diminiſhed or ſplit.

For any particular anſwer to this the reader is referred to the after part of this treatiſe, where the advantages of reviving juries in certain civil queſtions at the diſcretion of the Court are treated of at large, independent of the alteration ſuggeſted in this part.

It ſhall only here be obſerved in general, that to give any plauſible colour to the objection made, it ought to be propoſed at the ſame time, That the Court of Seſſion ſhould act as a jury, take proofs before themſelves, from the mouths and countenances of witneſſes, and try and decide the fact inſtantly upon the ſpot, as juries do. But in place of ſuch a method, what is our form? It is to leave out the chief part of the jury character, by truſting almoſt all proofs to be taken extrajudicially by one or two commiſſioners. Any argument, therefore, founded on the jury character of the Court, may be left out of the preſent conſideration; and it may now be ſaid with confidence, if any thing can be ſaid with confidence, that there is not a colour of argument left for the neceſſity of ſuch a number as we have to ſit and judge together, either in matters of law or fact: nay, even ſuppoſing, in caſe of their being divided into ſmaller bodies, that any new unprecedented and nice caſe in law might require

quire the opinion of the whole number, as in England; yet ſurely it does not follow from thence, that there is the ſmalleſt neceſſity, or even propriety, in aſſembling or keeping together the fifteen ſupreme Judges to carry on the ordinary buſineſs of the Court, the greater part of which is perfectly eaſy, and even matter of courſe, when they might be uſefully employed, as Ordinaries, in carrying on their Outer-Houſe buſineſs, or, as Chambers or Committees of the Court, in trying and judging even Inner-Houſe cauſes.

What has been urged to prove no neceſſity for a plurality of Judges, has not only paved the way, but in ſome degree anticipated ſome of the arguments upon the ſecond queſtion propoſed, namely, Whether the employing of ſuch a number of Judges as fifteen, or their quorum of nine, to ſit and judge together in all ſorts of cauſes, does not give occaſion to great obſtruction and delay in the adminiſtration of juſtice?

This is by much the more important queſtion; for if the number of Judges judging together were only unneceſſary and uſeleſs; if this mode were attended with no poſitive diſadvantage in the buſineſs of the Court, the preſent deliberation could reſult only in a matter of œconomy, namely, that the ſalaries of perhaps one half of the Judges might be ſaved to the public. But that is a matter of ſmall importance, compared to the object of the preſent diſquiſition, which is the preventing

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of obſtruction and delay in the adminiſtration of juſtice to this part of the united kingdom. Few words will be neceſſary to make this queſtion as clear as the other.

The buſineſs of the Court has been already deſcribed, and ſome parts will be more minutely diſcuſſed in the after treatiſe on juries. For grounding our preſent argument, let us only take a view of the ſum of the account.

The Judges are employed weekly by rotation in the Bill-chamber and Outer Houſe, in hearing cauſes argued at the bar, or in conſidering them when reduced to writing, in repreſentations, memorials, condeſcendences, anſwers, replies, duplies, and the whole infinite maſs of written pleadings which follow them, after the week's ſervice in the Outer Houſe is at an end; and theſe cauſes are conſtantly kept alive by callings at the morning-hours, between nine and ten, in the Outer Houſe, where three of the Judges regularly attend in turn for carrying on theſe proceedings, till they give their final judgement, or take the cauſe to report to the Inner Houſe.

Again, the buſineſs of the Inner Houſe is, firſt, the judging of ſome particular cauſes, (not many in number), which come originally before it by petition, in order to be judged ſummarily; but its principal buſineſs is as a court of review, of the judgements of the ſingle Ordinaries, in the Bill-chamber or Outer Houſe,

and

and alſo of its own firſt judgements. All theſe cauſes are tried by it, either upon hearings *viva voce*, or in printed pleadings; theſe are petitions, anſwers, memorials, ſtates, &c. upon which they debate and exerciſe their judgements; and in this duty they generally employ the hours between ten o'clock forenoon and two o'clock afternoon.

In order to form ſome notion of the time neceſſary for reading the printed pleadings, one of the Judges directed his clerk, a perſon of great attention and accuracy, to keep an exact account, from day to day, of the number of pages contained in the printed papers coming before the Court, to be adviſed, betwixt the 11th of June and 12th of Auguſt 1786, being the ſummer-ſeſſion of that year; and they turned out thus:

	4to pages.
1. Petitions, called ſingle bills, -	2704
2. Petitions, with anſwers, memorials, informations, ſtates of proof, &c.	5606
Total prints,	8310

No doubt the petitions, in the ſecond of theſe two claſſes, are the ſame with ſome of thoſe in the firſt; but they may be fairly reckoned twice, as they come in at diſtance of time to be adviſed with the anſwers, and muſt be read a ſecond time.

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If the above Summer Seſſion may be taken as an average for two months, and as the Winter Seſſion is double that length, it will follow, that the total prints to be read, adviſed, and conſidered by the Lords of Seſſion in the ſpace of one year, or rather in the ſix Seſſion months, will amount to 24,930 quarto pages.

Theſe, beſides the bills, repreſentations, condeſcendences, anſwers, replies, duplies, &c. with the buſineſs of the Bill-chamber and Outer Houſe already mentioned, none of which are printed.

To read and digeſt all theſe prints, is the duty of every Lord of Seſſion in the Inner Houſe, the Lord Preſident having the additional trouble of ſtating the petitions, and conducting the order of buſineſs there; and the ordinary Lords, in addition to their Inner-Houſe duty as has been ſaid, having to carry on the proceedings, and to read the written pleadings in cauſes that have been fixed before them in the Bill-chamber and Outer Houſe: theſe are undoubted facts, and cannot be controverted.

Let it next be conſidered, what portion of time is neceſſary for accompliſhing all this buſineſs; and no perſon who tries it will pretend, that at an average it can be done in leſs than eight hours a-day at home, beſides between four or five hours attendance in Court for five days in the week.——Such is the labour of the Judges who are Lords of Seſſion only, but

that

that of thoſe who are alſo Lords of Juſticiary is far greater.

By the act of the ſecond Parliament of Charles II. in 1672, cap. 16. intitled, *Concerning the regulation of the judicatories*, the office of juſtice-deputes was ſuppreſſed, and in their place five of the Lords of Seſſion were joined to the Juſtice-General and Juſtice-Clerk, and this new Court was appointed to meet each Monday at nine o'clock in time of Seſſion, and oftener if buſineſs ſo required, &c. By that act and poſterior regulations, theſe Judges are appointed alſo to go the three circuits, ſouth, north, and weſt, and to hold Courts at the circuit-towns twice in the year, two Judges going together.

Thus ſix of the Judges of the Court of Seſſion (for the Juſtice-Clerk, though not neceſſarily, yet generally is choſen out of that body), have upon their ſhoulders, not only the Seſſion buſineſs above deſcribed, but alſo the whole criminal buſineſs, which is of late years greatly increaſed, and is annually increaſing.

And they muſt employ in that buſineſs the Monday weekly, the only vacant day which the Lords of Seſſion have for reading their papers at home. The concluſion which muſt be drawn from theſe premiſſes as to both Courts, are too glaring to need any further explanation.

If the overload of buſineſs in the Court of Seſſion, as above deſcribed, be true, as it certainly is, and if it cannot be brought within

due compaſs upon the preſent conſtitution of that Court, it is not material to inveſtigate the cauſes of it.

Upon that topic, however, it may be obſerved, that, without inquiring, whether for a century backward the cauſes coming before the Court yearly have increaſed much in point of number; yet certain it is, that they have greatly ſwelled in bulk, both from their kind and from the manner of conducting them. Our ancient law-ſuits were chiefly of the feudal ſort, or they were diſputes between landlord and tenant, or concerning ſervitudes and other points not much involved in fact or in accounts: they made a great figure in the rolls, but were ſoon diſcuſſed; and the feudal queſtions are moſtly all ſettled and at reſt. But ſince the Revolution, or rather ſince the Union of the Kingdoms, the increaſe of trade and manufactures in this part, have given riſe to a new ſet of cauſes of much greater magnitude, as being concerned with foreign places, with foreign laws, and as being often involved in intricate accounts.

The art of protelation is alſo improved: Every paper now produced by way of pleading, is an eſſay or pamphlet; and as the length of our laws and acts of Parliament themſelves has been much increaſed, ſo has the length of our law proceedings; and the evil is alſo greatly aggravated, by the late invention for conveying information to the Judges, namely, the

eaſy

eaſy vehicle of the preſs. It is true, that in conſequence of the ſuggeſtions mentioned in the beginning of this Paper, ſome late acts of ſederunt have been made to alleviate theſe evils, and it is hoped theſe acts may have ſome effect to make the buſineſs go on in a more regular manner; but there is no reaſon to expect that they will have any conſiderable effect as to the diminution of the labour, which is ſo very ſevere, that few conſtitutions can endure the fatigue of it.

But independent of the fatigue, there is another material conſideration. It is this, that among equally able, and equally learned men, all may not be equally expeditious in getting through buſineſs. Suppoſe a time ſhould come, when the Court ſhould happen to conſiſt of members unequally matched in that reſpect, what would be the conſequence? This ſurely, that many Judges who would be equally uſeful with others were a little more time allowed them, yet being ſomewhat ſlower in their motions, will be totally left behind in the buſineſs of a Court, where all are put to their ſpeed: And thus cauſes, which by the conſtitution of the Court ought to have received the judgement of the whole, will be determined by the judgement of two or three who happen to be a little more ſwift of foot, though not more ſure of foot than the reſt of their brethren. Add this obſervation, that as it is truly a thing impoſſible for every Judge to keep up both his Inner-Houſe and Outer-

Houſe buſineſs, that is, if he reads all his Inner-Houſe papers, to beſtow due attention on the written pleadings of the Outer Houſe, the conſequence is, that the Outer-Houſe papers muſt repoſe in their tape till the vacation. Here is a delay of three months at leaſt, and may be of ſix: the conſequence of which is, an embargo of the buſineſs of fourteen ſeparate Courts during the period mentioned, and that too in the preliminary and preparative ſteps, and before proof is admitted and taken. This delay is far worſe than delay in the Inner-Houſe buſineſs, into which cauſes do not come till after the proof is concluded.

Take along one obſervation more. In carrying on the buſineſs of the Court when the Judges are met together, it is a thing impracticable, that each of fifteen ſhould deliver his opinion upon every caſe, and aſſign his reaſons: the conſequence of which is, that ſuppoſing all of them to have almoſt read their eyes out, unleſs they make a ſpeech, parties and their agents will not believe that the whole Judges have read their papers or underſtood their cauſes; and this is not only productive of very unjuſt and indecent cenſure againſt the Court, and derogatory to the dignity and reſpect which they merit, and ought to poſſeſs, but is one great cauſe of the number of ill-grounded appeals from this Court to the Houſe of Lords. This obſervation is juſtified in every ſenſe by a recent example, namely, that during the ſeſſion of Parliament in 1786, there were

ſix

ſix times more appeals from the Court of Seſſion, than from the three courts in England all together, and except in very few inſtances, the judgements of the Court of Seſſion were affirmed.

Reference has already been had to the cuſtom of England. How would the doctrine of the whole Judges there judging together be looked upon in that country, where in termtime the number of each court conſiſts but of four Judges, and where, for a great part of the year, the whole twelve are ſeparately employed in trying cauſes finally. They would ſurely conſider ſuch a plan as a complete obſtruction to their ever getting through buſineſs. It would certainly be ſo there; and it is thought the obſervations which have been made, have proved to demonſtration, that alſo in this country ſo great a number of Judges as fifteen ſitting and judging together, is not only unneceſſary, but tends greatly to obſtruct and delay the adminiſtration of juſtice.

The evil therefore is clear and indiſputable; and we come now to the third point, viz. The remedy; and in general it may be ſaid, that the remedy here is as clear and indiſputable as the evil; which is indeed always the caſe where the remedy in ſome manner is pointed out by the evil, and ariſes out of it; and that is plainly the caſe here: for if the evil proceeds from the employing too many Judges together, the remedy muſt be in one word, Split them, and employ them ſeparately.

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This propoſal, and the reaſons upon which it is founded, have been juſtified by the example of the very nation from whom the model of the Court of Seſſion is ſaid to have been taken, as we learn from Monſ. Legier, in his late treatiſe upon the form of proceſs in the Parliament of Paris. The Parliament of Paris, ſays he, was originally the only one in the kingdom; but in proceſs of time the increaſe of buſineſs not only obliged their kings to inſtitute thirteen provincial parliaments with ſovereign juriſdiction, but alſo to divide the Parliament of Paris into five different chambers beſides the grand chamber, aſſigning them different departments *.

Even Lord Stair himſelf predicted, that upon the alteration of the method of taking evidence, the cauſes of the nation would become too bulky to be overtaken by one court of juſtice. For his Lordſhip, after mentioning, that

* Le Parlement de Paris fut dans l'origine le ſeul de tout le Royaume; mais lorſqu'il y fut rendu ſédentaire, et qu'on eut introduit la voie de l'appel de toutes les ſentences des Baillis et Sénéſchaux, la multiplicité des affaires obligea nos Rois de créer ſucceſſivement differens Parlemens, juſqu' au nombre de treize.

Les affaires s'étant accumulées et multipliées par la ſuite des temps, le Parlement ſe trouva ſi ſurchargé, que, pour l'expedition des procés, nos Rois jugerent à propos d'etablir differentes Chambres. Ainſi, on compte aujourd'hui dans le Parlement cinq Chambres, ſavoir, la Grande Chambre, trois Chambres des Enquêtes, et la Tournelle Criminelle. On pourroit encore ajouter à ce nombre une Chambre, ſavoir, les Requêtes du Palais, qui ſont compoſées de Conſeillers au Parlement. *See Traité Hiſtorique et Raiſonné d'apres les Loix, Reglemens, et Uſages, ſur les differentes procedures qui s'obſervent dans toutes les Juriſdictions de L'Enclos du Palais, à Paris, par M. Legier*, p. 2. & 3. & 325. publiſhed in 1780.

formerly

formerly parties were not allowed to be preſent at the taking of the teſtimonies of witneſſes, nor at the adviſing of theſe teſtimonies, he aſſigns, as a reaſon for the firſt, "that witneſſes might the more freely depone, without hazard of incurring malice or prejudice by the teſtimonies;" and for the ſecond, that if the teſtimonies were publiſhed, "the debates upon them would be drawn into much more length than the debates upon the relevancy, whereby one Court could not overtake the cauſes of a nation *."

His Lordſhip then gives an account of the ſtatute 1686, cap. 18. whereby witneſſes are appointed to be examined in preſence of the parties or their Advocates, and parties allowed to have copies thereof: An alteration ſuggeſted by the ſpirit of liberty, then beginning to breathe high; but which has moſt certainly produced the conſequences which his Lordſhip predicted, viz. That one Court is not ſufficient for the civil buſineſs of this nation.

From this precedent of the French parliament, which will be admitted to be very much in point, as well as from the obſervations which have been made, and the opinion of Lord Stair, it may be held as demonſtrated, that the Judges ought to be divided into Chambers or Claſſes, and employed ſeparately. The only difficulty remaining is, What is the beſt manner of ſo doing? What method is liable to the feweſt objections?

For

* Stair, lib. 4. tit. 46. § 17.

For the preſent, only two Plans have occurred, which ſhall be ſtated with much deference, and in the hopes that at leaſt they may ſuggeſt ſomething more perfect to others who are more able to judge in matters of this kind.

The *firſt* mode is that which is ſuggeſted in the firſt page of this Paper.

The *ſecond* is, to ſplit the Court nearly into halves, with co-ordinate juriſdiction, and ſimilar form of proceeding.

With regard to the *firſt*, the ſubſtance of the propoſal has been ſtated. The tenor of it, as contained in the ſuggeſtions above mentioned, ſtands in the following words.

" Whereas ſo great a number of Judges as " the Court of Seſſion in Scotland at preſent " conſiſts of, is no way neceſſary for judging " jointly in all the cauſes which come before " that Court, and that it would contribute to " the greater diſpatch of buſineſs, and the bet- " ter adminiſtration of juſtice, that in many " cauſes a ſmaller number than the whole be " employed to ſit and judge together: It is " therefore propoſed, That the fourteen ordi- " nary Lords of Seſſion ſhould be put into two " diviſions; and that, except the Judges to be " employed in the Outer Houſe as after men- " tioned, each diviſion, together with the Pre- " ſident, ſhall meet in the Inner Houſe at the " uſual time, at leaſt one day in each week, " during the time of Seſſion, and ſhall judge " and decide finally in ſuch cauſes as come o-

" riginally

" riginally before the Inner Houſe, or from
" any of their number reſpectively, as Ordi-
" naries in the Outer Houſe, or upon the Bills,
" with exception always of all cauſes de-
" pending upon the evidence of witneſſes,
" commonly called concluded cauſes, caſes of
" fraud, and all caſes concerning the right of
" freeholders, or of delegates, to vote at elec-
" tions of members of parliament, or con-
" cerning the election of magiſtrates of royal
" burghs, and all cauſes when the ſum or va-
" lue exceeds Sterling; and re-
" ſerving to the Diviſions reſpectively, to remit
" to the whole Court any other cauſe or point
" which to them may ſeem to require the
" united judgement thereof; and that the
" Quorum of each of the Diviſions ſhall be
" Three.

" §2. That upon the remaining days of the
" week, the whole Judges (with exception of
" thoſe employed in the Outer Houſe as after
" mentioned) ſhall meet as uſual, with the Pre-
" ſident, in the Inner Houſe, for the diſpatch
" of buſineſs there; with this variation, that,
" in place of nine, the Quorum hereafter ſhall
" conſiſt of Seven."

The mode propoſed in theſe two articles would have the effect to relieve the Judges of one half of the leſs important Inner-Houſe cauſes; and, by ſaving each of them one day's attendance in the week, would give them, not only leſs buſineſs, but more time to do it.

This would not only be a conſiderable relief to them, but would alſo promote the diſpatch of buſineſs.

It could be liable alſo to the leſs objection, that it would not give occaſion to any ſenſible change in the manner of carrying on buſineſs before the Court, nor in the leaſt affect thoſe concerned in carrying it on. The counſel would have no diſtraction in their attendance, this being no new or ſeparate Court; and the attendance of the clerks, and their duty, would be the very ſame as at preſent. In ſhort, the Court would ſeem in every reſpect the very ſame, ſave that upon the two days appointed for the meeting of the Chambers, one half of the Court would appear abſent for one of theſe days, and the other half for the other of them. The only doubt is, that ſo great is the overload of buſineſs, this remedy might not be quite a complete one.

The *ſecond* plan, namely, To ſplit the Court into two Chambers, promiſes better; and a general view of it may be ſtated in the following articles, viz.

1*mo*, That each of the two Chambers ſhould conſiſt at leaſt of Six Judges, leaving out of the account the remaining two or three, upon the ſuppoſition, that among fifteen men advanced in years there may generally be ſome whom the infirmities of old age may diſable from a punctual attendance on their duty, and whoſe paſt

ſervices

ſervices may intitle them to the enjoyment of their ſalaries during life.

2*do*, That the firſt of theſe two Chambers ſhall conſiſt of the Lord Preſident and five Ordinary Lords of Seſſion at leaſt who are not Commiſſioners of Juſticiary; and the ſecond to conſiſt of the Juſtice-Clerk and the five Lords of Seſſion who are Commiſſioners of Juſticiary, —the Juſtice-Clerk to preſide.

As the Court of Juſticiary is already a ſeparate court for criminal buſineſs, this diviſion ſeems the moſt natural; though there would be nothing improper in the Judges of the different Chambers ſupplying one another's places, ſhould occaſion ſo require.

3*tio*, That theſe two Chambers ſhould have much the ſame juriſdiction as at preſent reſides in the whole Court, with this explanation, that perhaps the Equity part ſhould be communicated to the Chamber of Seſſion only, but not to the Chamber of Juſticiary, which may be confined to ſtatute and common law; and in caſe it ſhall be thought expedient to revive jury-trial in certain civil cauſes, that the laſt week of each Seſſion might be ſet apart for taking the evidence that would fall to be taken at Edinburgh, in ſuch jury-trials as the Court ſhould think fit to order.

4*to*, That theſe jury-caſes ſhall be the department of the Judges in the Chamber of Juſticiary, who are accuſtomed to that method; and, by way of compenſation for that extra-

ordinary trouble, they may be relieved of judging in all or ſome of the proofs, not taken before a jury, but committed to writing, according to the preſent mode.

5to, That the judgements of each of the Chambers ſhall have the ſame force and effect as thoſe of the whole Court, without any liberty to the parties to apply for any review, otherwiſe than by appeal to the Houſe of Lords; it being always underſtood, however, that either of the Chambers, in their diſcretion, may, in queſtions of nicety, order ſhort caſes to be made up, like thoſe made up for the Houſe of Peers; and the points to be argued before the whole Twelve Judges, who may meet occaſionally, or on ſtated days, for that purpoſe; as is the practice in England when any very new and unprecedented caſe occurs in any of the three ſuperior Courts; and it is probable, that, at leaſt for ſome years to come, it may be proper our whole Court ſhould meet once a-week, or oftener, in that manner, till the Chambers have got into form.

To the great outlines contained in theſe articles, it is propoſed the application for an act of Parliament be confined. The particulars mentioned, and others of the ſame kind, will be beſt regulated by acts of ſederunt to be made by the Court itſelf, who are already impowered, for that purpoſe, to make regulations for their forms of proceeding, and who can make experiments, and upon trial even change what they

they find inconvenient. It is only neceſſary to apply to Parliament for ſuch changes as have been mentioned which the Court have no power to make for themſelves.

Should it be thought expedient to make the forms of proceeding in the Juſticiary Chamber ſomewhat different from thoſe in the Chamber of Seſſion, there might be a little aukwardneſs at firſt; but they would ſoon become eaſy. Beſides, where parties may like the old method beſt, they would have it in their choice to ſtick to it, by bringing their cauſes into the Seſſion Chamber.

This Part ſhall be concluded with obſerving, that all the occaſional inconveniencies which may be ſtated as difficulties in making the change propoſed are obviated by the obſervation above made, That for ſome conſiderable time the two Chambers may be made uſe of merely for the diſpatch of cauſes of little importance, and of matters which go of courſe; and that all cauſes of any material conſequence ſhould, as long as ſhall be found expedient, continue to be tried by the whole Judges, as in times paſt.

CHAP.

CHAP. II.

Concerning the LIMITATION *of* LITIGATION *in ſmall Cauſes.*

HAving, it is thought, ſaid enough to bring the ſubject of this Propoſal for dividing the Court into Chambers under general conſideration and diſcuſſion, which will certainly produce, in due time, ſome ſyſtem more complete than what is contained in theſe looſe ſuggeſtions, it is now propoſed to bring under view a ſeparate remedy, which, it is humbly thought, may conſiderably co-operate to alleviate the evils complained of.

The delay and expence of the law are grievous in all cauſes, even in thoſe of the firſt magnitude; but in ſmall cauſes they are perfectly ruinous to the lower ranks of people, whoſe all often depends upon the event in ſuch cauſes, and whoſe advantage it would frequently be, rather to loſe their cauſes, provided they be loſt expeditiouſly, and with little expence, than to have them hung up for years, and where the coſts often turn out to be of greater amount than the original ſubject in diſpute.

It will be perceived, that by the preſent conſtitution of the Court above deſcribed, cauſes may be brought over and over again under the conſideration of the Judges; as for inſtance, Suppoſe a cauſe which has received judgement from a ſheriff-depute, or other inferior judge, is brought into the Court of Seſſion by a bill of advocation or ſuſpenſion; which bill is generally followed with anſwers and replies; if the Lord Ordinary on the Bills ſhall refuſe the bill, it is competent to the party ſuppoſing himſelf aggrieved to offer, in time of vacation, ſecond, third, and fourth bills, without end, to the ſucceeding Lords Ordinaries on the Bills; and in time of Seſſion, to offer a reclaiming petition to the whole Court; to which reclaiming petition, if anſwers are allowed, and if the petition is thereupon refuſed, a ſecond reclaiming petition may in like manner be offered; and if the Court, upon adviſing that petition, with anſwers, ſhould be of opinion, that the bill of advocation or ſuſpenſion be paſſed, here, after one judgement of the Lord Ordinary, and two judgements of the whole Court, no more is decided than this ſingle point, viz. That the cauſe is a proper cauſe to be tried in the Court of Seſſion.

The cauſe then comes to be tried before the Lord Ordinary in the Outer Houſe, where it receives at leaſt two judgements from him; and if the parties are not then ſatisfied, it goes to the Inner Houſe, and may receive two ſucceſſive

ceſſive judgements there, before it is final. All this is in the power of obſtinate litigants, to the infinite vexation and ruin of many a poor man; and the evil is aggravated by this circumſtance, that careleſs or litigious agents, knowing they have ſo many opportunities of being heard and reheard, are apt, in their firſt written pleadings, to ſtate only one half of the cauſe, and that too in ſuch a careleſs and negligent manner, often filling it with ſuch heaps of traſh, as makes it infinitely more difficult to be developed, and adds greatly to the expence of the parties and labour of the Judges.

It was to remedy this evil, that, by the 20th Geo. II. cap. 43. an act aſcribed to Lord Chancellor Hardwick, it was provided, "That any perſon in Scotland aggrieved by any decree or ſentence of any ſheriff's or ſtewart's court, or of the court of any royal borough, or of the court of any regality or barony, or of any baron, &c. in any matter criminal, not extending to the loſs of life or demembration, or in matters civil not exceeding L. 12 Sterling, may appeal to the next Circuit Court, of the circuit within which the ſaid Court ſhall lie, ſo as no ſuch appeal be competent before a final decree pronounced, &c.; and the Judges at ſuch Circuit ſhall cognoſce and determine ſuch appeals, by the like rules as the Courts of Seſſion or Juſticiary reſpectively may now cognoſce and determine in ſuſpenſions; but the

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ſaid Circuit Court ſhall proceed in a ſummary way; and if they find the reaſons of appeal not relevant, or not inſtructed, or if they determine againſt the appellant, they ſhall award coſts, not exceeding the real coſts *bona fide* expended; *and their decree ſhall be final.*"

It is thought, that it would be an exceeding difficult taſk for any man to demonſtrate, that a Lord of Seſſion or Juſticiary ſitting in the Bill-Chamber or the Outer Houſe, cannot judge in a cauſe of L. 12 or leſs, as well as he could do ſitting in his Circuit Court; and why there ſhould not be as good reaſon for making his judgement *final* in the one caſe as in the other, more eſpecially as in Edinburgh he has more leiſure and opportunity for deliberate conſideration than in a Circuit Court, where he is only to remain for three or four days.

This ſurely ſets in a ſtrong light, the abſurdity of permitting ſmall cauſes to be ſo repeatly ſubmitted to the judgement of Ordinaries, and if parties are not ſatisfied therewith, to the judgement of the whole Court, in manner above deſcribed; and the abſurdity will not appear the leſs, that by many Britiſh ſtatutes the juſtices of peace in their quarter-ſeſſions are empowered to judge *finally* in cauſes of much higher value than L. 12 *.

* For example, ſee the Monkland Canal Act, 10th Geo. 3. cap. 105. the Stamp Acts of 23d Geo. 3. cap. 67. of 14th Geo. 3. cap. 7. of 26th Geo. 3. cap. 48. the Perfumery Act of 26th Geo. 3. and many others.

The evil here ſtated would ſeem to point out its own remedy, namely, " that in all cauſes not exceeding L. 12, (and conſidering the alteration of the value of money no harm though the ſum were doubled), the decree of any one of the Judges in the Court of Seſſion, whether in the Bill-Chamber or in the Outer Houſe, ſhould be final and concluſive to all intents and purpoſes whatever."

For this regulation alſo, the authority of Parliament is neceſſary, as it is beyond the power of the Court to make it by an act of ſederunt.

CHAP.

CHAP. III.

Concerning the revival of JURY-TRIAL *in certain Civil Actions.*

THE preceding Propoſal for dividing the Court of Seſſion into Chambers makes mention of certain printed Suggeſtions, which, in January 1787, were handed about among the Members of the College of Juſtice. Among other things, theſe Suggeſtions propoſe, "That in all actions concluding for reduction "or reſtitution, or for damages or diſabilities, "on *the head of fraud or injury*, and where "the evidence of ſuch fraud or injury de- "pends on parole-teſtimony, it ſhall be com- "petent to the Lord Ordinary *on Oaths and* "*Witneſſes*, at the deſire of either of the par- "ties, to try the cauſe by ſpecial jury; the "jury in all caſes to have a gratuity for their "loſs of time when called to be ſo employed, "as in England."

As that paper came into few hands, and as it took but a limited view of the ſubject, it is thought the importance of the queſtion merits a more extenſive diſcuſſion; for which end, the following conſiderations have been thrown to-

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gether, in the hopes that abler pens may be employed in bringing the voice of the Public to a deciſion upon it.——That is the object of this Paper: And it is the happy conſtitution of this kingdom, not only to permit, and even to encourage, the free diſcuſſion of ſubjects of every kind, but alſo to liſten to, and to reſpect, the calm and diſpaſſionate voice of the people.

In order to take a view of this ſubject in a regular manner, after premiſing ſome things upon the nature of evidence in general, it will be fit to conſider the different ways of taking evidence, viz.

1*mo*, Whether it ſhould be taken publicly, and in preſence of the party?

2*do*, Whether in preſence of the Court which tries the cauſe, or by a commiſſion?

3*tio*, Whether parole-evidence ſhould be reduced into writing?

4*to*, Whether the truth of the evidence is beſt tried by a jury of men choſen from the body of the people, or by Judges in the law, who are to decide upon the cauſe?

And, *laſtly*, To bring the obſervations made on theſe topics home to the preſent queſtion, by conſidering the various modes of taking and trying evidence in civil cauſes in Scotland, and conſidering, Whether it be expedient to make any or what alteration upon theſe modes? and particularly, Whether jury-trial ought not in

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ſome degree to be revived in certain cauſes of great importance?

It may firſt be obſerved in general, That the ſole object of taking evidence in any ſuit, civil or criminal, is to find out the truth of fact; and it will be admitted, that the beſt way of finding out truth muſt be the beſt manner of taking evidence.

It is a maxim, That *ex facto jus oritur*: The law depends upon the fact. To find out the truth of fact, is the capital object. If the fact is not diſcovered, there ought to be no farther trial: for if the law is applied to a falſe fact, there can be no juſtice in the deciſion.

To attain juſtice, truth muſt be diſcovered in the firſt place; and it is to be conſtantly kept in view, that the beſt manner of diſcovering truth muſt be the beſt way of taking and trying evidence; and if this way can be diſcovered, it ought to be purſued, whatever inconveniencies, trouble, or expence, may ſtand in the way.

Evidence is of two kinds: It is direct, or circumſtantial; and both kinds may either be taken from writings, or from the mouths of witneſſes.

Direct evidence is a teſtimony of the fact in queſtion, by perſons who have been eye or ear witneſſes to what is alledged to have been done or ſaid, or by the acknowledgement of the party in writing; and if the witneſſes are credible, or the writings authentic, the evidence

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is complete, and the fact alledged muſt be true, as thus: I ſaw the parties meet and fight, and ſaw one of them ſhoot the other through the head with a piſtol: Or, in a civil matter, I was preſent when John ſold and delivered to James a horſe for L. 40 price, which was immediately paid by James to John, in two bank-notes of L. 20 each.

If the witneſſes here ſpeak the truth, the evidence of the fact is complete.

The other kind, viz. circumſtantial proof, conſiſts in evidence, not of the fact itſelf, which may have happened *remotis arbitris*, but of circumſtances which infer or preſume the fact to have been done by the party charged therewithal: As for inſtance, James is found dead, run through the body with a ſword. One witneſs is produced, who depoſes, That he has often heard John, the party accuſed, utter expreſſions of reſentment and ill-will againſt James on account of a law-ſuit; a ſecond witneſs, That they were ſeen together on the morning of the day when James was killed; a third, That he ſaw John coming from the place with a ſword in his hand bloody: A part of that very ſword broken off is found lying near the dead body.

Or, in a civil matter, concerning the bargain and ſale of a horſe by James to John, found in John's poſſeſſion at the time of his death. One witneſs depoſes to his hearing the parties treat about the purchaſe of the horſe; another,

another, That he heard James ſay, he had bargained with John about the horſe; a third, That James had ſent the horſe by him to John; a fourth, That he had ſeen John uſe him at work along with his own horſes; and other circumſtances might be added.

This ſort of proof, by circumſtances, is leſs complete than the other; becauſe, though all the witneſſes may have ſpoken the truth, yet the proof is not excluſive of innocence in the firſt of the inſtances above mentioned; nay, that the party accuſed had been defending the man murdered; and, in the other caſe, is not excluſive of the horſe's having only been on trial, and never ſold.

At the ſame time, this kind of proof is often more convincing than direct proof; becauſe, where a great number of circumſtances are diſtinctly proved by different witneſſes, a concert among them is next to impoſſible; but in the direct proof, where two witneſſes concur in a ſimple fact, it is an eaſy matter for them to have agreed to give falſe evidence; and a difference in any one circumſtance which both muſt have known, will diſcredit both; as in the caſe of Suſannah and the two Elders.

For the preſent, it is not neceſſary to enter more deeply into the nature and kinds of evidence. What has been ſaid is ſufficient to introduce the preliminary queſtions concerning the manner of taking and trying evidence.

The firſt of theſe queſtions is, Whether the party,

party, or ſome perſon on his behalf, ſhould be admitted to be preſent at the time of taking the proof.

It ſeems to be matter of no ſmall wonder, that the contrary practice ſhould ever have obtained a footing; yet ſuch has been the practice in ſome kingdoms; and it is particularly ſo at this day in the Palais Royale in France, where arbitrary government is perhaps the mildeſt that ever exiſted in any kingdom. There, however, proof is taken by an Inqueſt, conſiſting of one or more of the Judges, or by Commiſſioners named for the purpoſe, and the parties are not permitted to be preſent.

If the maxim here laid down, That the ſole object of proof is truth, and that the beſt mode of diſcovering truth is the beſt manner of taking evidence; ſurely the French method muſt be condemned, ſeeing the parties concerned are not only the beſt able to interrogate witneſſes, but alſo witneſſes being confronted by the parties, will be leſs apt to tell falſehoods; or if they ſhould be ſo diſpoſed, will be eaſily checked or drawn into contradictions, by occaſional queſtions ariſing upon their own anſwers, and which beſt occur to the oppoſite parties.

The practice of examining witneſſes in ſecret would be a reproach to the judicial ſyſtem of a free people.

As to the ſecond preliminary queſtion, Whether proof ought to be taken in preſence of the court

court which tries the cauſe, or by commiſſion? and the third queſtion, Whether parole-evidence ſhould be reduced into writing? they are ſo intimately connected together, that they cannot well be conſidered ſeparately: and if it is kept in view, that the ſole object of taking proof is to find out the truth, there will be as little difficulty in theſe queſtions as in the firſt.

In carrying on the buſineſs of the world, the neceſſity of ſpeaking truth is apparent: For, were it a thing indifferent to ſpeak truth or falſehood, human life would be a conſtant comedy of errors, and ſociety could hardly exiſt for a day. It is for the beſt purpoſes that there is impreſſed on the mind of man a ſtrong inſtinctive love of truth, which, without any diſcourſe of reaſon, is congenial to our nature, and diſpoſes us to ſay truly what truly is. On the other hand, falſehood is not only naturally avoided, but is even abhorred; and when, from wrong motives, a man is tempted to utter a falſehood, his conſcience flies in his face, telling him he is doing wrong; nor does it ſtop with informing himſelf only; for it alſo informs others.

It is a wiſe diſpoſition of nature, that information of what paſſes in the mind of man is not confined to words alone, but is alſo expreſſed by looks and geſtures, which have this advantage over words, that they are often involuntary,

luntary, and even ſpeak againſt the will of the ſpeaker, nay contradict his words.

As the ſtrings of a muſical inſtrument, according as they are ſtruck, produce certain correſponding ſounds; ſo the different motions of the mind produce a correſponding expreſſion in the eyes and muſcles of the face, which exhibit a hiſtory-piece of what is paſſing within. Men who, by long habits of vice and diſſimulation, are exceedingly depraved, may ſometimes deceive; but ſuch is the power of the original diſpoſitions of nature, that even theſe men, if ſtruck ſuddenly, and taken at unawares, are liable to be betrayed by their own organs, and to contradict by their looks what their tongue has falſely uttered.

Heu quam difficile crimen non prodere vultu!

Lord Bacon ſays, "It is hard to find ſo great "and maſterly a diſſembler, or a countenance "ſo well broke and commanded, as to carry "on an artful and counterfeit diſcourſe, without ſome way or other of betraying it *."

But this beſt information is altogether loſt where witneſſes are not examined in preſence of the Court which tries the cauſe. The Court in that caſe have at beſt only the words of witneſſes, not their evidence.

* De Augm. Scient. § 25. of *Self-policy*, p. 222. See alſo his Doctrine of Man, § 8. p. 92.

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Theſe obſervations include alſo the third queſtion, concerning proofs taken by commiſſion, which are reduced into writing, and reported to the Court that tries them. In that caſe, when this written proof is read over to the Judge, little other difference between one witneſs and another can ſtrike him, but that the name of the one is *John*, and of the other *James*. There is much in the appearance of a witneſs, much in the manner of giving his teſtimony. Theſe are the expreſſions of his character, and upon theſe his credibility does often entirely depend. Who ever pretended that theſe could be expreſſed in a written depoſition? more eſpecially as it is impoſſible to take down the whole words of a witneſs exactly as they are ſpoken; neither can the meaning be completely underſtood, unleſs the queſtion be alſo put down, and be accurately penned. The alteration or omiſſion of a ſingle word will alter the ſenſe.

When a witneſs's depoſition is to be taken down in writing, he gets more time to digeſt a falſely-contrived tale. It often happens, too, that in dictating to the clerk what a witneſs has depoſed, diſputes ariſe concerning the expreſſion he has uſed. Theſe diſputes ſerve to inſtruct the witneſs, in caſe he has any bias, which too often is the caſe, what his party wiſhes him to have ſaid: ſo that, when he is appealed to for an explanation, he retracts his words, and gives his evidence a new colour and

complexion, exactly as his party wiſhes to have it.

Parole-teſtimony taken in preſence of the Court, and not coolled nor mangled in the repetition of an unſkilful commiſſioner dictating to a clerk, is not liable to theſe defects. The witneſs is quickly followed up by queſtion upon queſtion, by which he is driven to the wall, as it were, and brought to a nonplus; *ſolvuntur riſu tabulæ*; and all he has ſaid goes for nothing.

Add alſo theſe farther differences: In courts of law there are able counſel practiſed in the art of interrogating witneſſes; and this is a great matter. They quickly perceive when a witneſs begins to ſtagger, and to ſtruggle with his conſcience. They diſcover alſo when his heſitation is owing to baſhfulneſs or ruſticity. They know how to preſs in the one caſe, and how to ſpare and encourage in the other. Or ſhould any of them be diſpoſed, which men of character will not be, to make a bad uſe of their ſkill, and to confound or brow-beat a baſhful witneſs, the knowledge, the experience, and the impartiality of the Judge, are ready to interpoſe, and are a check and controul upon all concerned.

Indeed, the preſence and dignity of able Judges have, of themſelves, great effect upon the behaviour of a witneſs: Before them he ſtands in awe, and is much more afraid to tell a falſehood than in a private room, ſtanding

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on a level, as it were, with the commiſſioners, private men, often of very inferior character, after dinner, and bottles and glaſſes on the table, as is too frequently the caſe.

The benefit of this method of interrogating witneſſes was well known among the ancient Romans. Quintilian mentions it, and gives good inſtructions upon it: It is alſo well expreſſed in the Emperor Hadrian's epiſtle to Varus, *Tu magis ſcire potes, quanta fides ſit habenda teſtibus; qui et cujus dignitatis et cujus æſtimationis ſint; et qui ſimpliciter viſi ſint dicere; utrum unum eundemque meditatum ſermonem attulerint, an ad ea quæ interrogaveras, extempore veriſimilia reſponderint.* And again, in his reſcript to Galuinius, *Alia eſt auctoritas præſentium teſtium, alia teſtimoniorum quæ recitari ſolent* *.

Theſe things are obvious, and may be eaſily conceived; they may alſo be eaſily known from experience. Let any man attend the ſittings of the Chief Juſtices at London, or of the Engliſh Judges in their circuits, he will have no difficulty in pronouncing, That although a falſe witneſs may perjure himſelf, yet ſeldom or never can he deceive or miſlead either judge or jury. Let a witneſs be ever ſo ill diſpoſed, ever ſo crafty, yet there are ſo many eyes, ſo many ears, ſo much ability and experience upon the watch, that he is inſtantly detected, ſhould he ever attempt to double or to hide himſelf under

* Lib. 22. Dig. tit. 5. l. 3. pr. & § 4.

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ſilence and pretended ignorance, or, in ſhort, to make the ſmalleſt deviation from the ſimple path of truth.

How different this is from the caſe of proof taken by commiſſioners, ſurely needs no farther explanation; and although when no better may be, as in the caſe when a witneſs is ſick, or is abroad, a commiſſion may be neceſſary, or where ſome very ſimple queſtion of fact is to be aſked at a witneſs, and where there is no hazard of miſtake, a commiſſion is neceſſary, or may be allowed; yet it is thought, that what has been ſaid is ſufficient to eſtabliſh this general maxim, That a proof taken *in judicio*, warm from the mouths of the witneſſes themſelves, is better calculated for the diſcovery of truth, than when taken down in writing by a commiſſioner, to be reported and ſerved up as a cold diſh to the Court which is to judge of it; and that it is alſo better to be taken by that Court all at once in the manner above deſcribed, to be inſtantly judged upon, than when taken and committed to writing at different times and ſittings, to be judged of after adjournment, even by the very Court before whom it was taken.

Theſe obſervations are juſtified by the authority of Lord Stair, who intimates, (lib. iv. tit. 46. § 17.) That prior to the year 1686, the Court, ſo far from delegating its power of examining witneſſes to commiſſioners, did not even allow the parties or their counſel to be preſent

preſent at the examination, for fear of the witneſſes being influenced by their preſence: "Parties," ſays his Lordſhip, "were not allowed to be preſent at the adviſing of the teſtimonies of witneſſes, nor to ſee the teſtimonies: For when they were taken, none but every ſingular witneſs could be preſent; and when all had deponed, the Lord Ordinary (viz. the Judge-Examinator) put the teſtimonies under his own ſeal. They were not opened again till they came to be adviſed; and ſo ſoon as decreet was pronounced, they were again ſealed up, never to be opened thereafter. The reaſon then given was, that the witneſſes might not incur malice or prejudice, &c and becauſe all probation depends upon the faith and belief of the Judges, which is their proper truſt," &c. And after mentioning the alteration of that cuſtom, by the act of Parliament 1686, ch. 18. he ſubjoins as the reaſon, "That parties or advocates may more effectually follow them with emergent interrogatories, putting them in mind of circumſtances."

And this leads to the *fourth* queſtion, namely, Whether the truth of evidence is beſt tried by a jury of men choſen from the body of the people, or by the Judges in the law who are to decide upon the cauſe?

This is momentous, and deſerves a deliberate diſcuſſion. The mode of exerciſing juriſdiction in arbitrary governments, ancient or modern, is not worthy of inquiry in a free

ſtate.

ſtate. Greece or ancient Rome contained the beſt models from whence any information worth having is to be derived; and though it is exceedingly difficult to ſay what was the particular ſyſtem of the former, yet thus much we learn from the orations of *Demoſthenes*, from *Suidas*, from *Pollux*, from the *Scholiaſt* upon *Ariſtophanes*, and other ancient authors, that in Athens the ſupreme juriſdiction was veſted in nine magiſtrates named *Archons*, annually choſen by lot from a ſuperior claſs of the people, namely thoſe who had been citizens for three generations, and who had ſerved in the wars, and had a competent eſtate. They were not admitted to the exerciſe of their offices till they had paſſed two trials, one in the Senate-houſe and one in the Forum; and they took a ſolemn oath to obſerve the laws with impartiality.

The great claſs however for ſpecial trial of cauſes was the *Halicia*, compriſing from fifty to five hundred perſons, choſen annually by lot out of the body of the people. They were called Dicaſtæ or Judges, and they took a ſolemn oath of office in the name of Jupiter, Neptune, and Ceres, which Demoſthenes in his oration againſt Timocrates recites *verbatim*.

Cauſes were firſt brought before the Archons, who examined whether they were in due form, and relevant in their concluſions. In that caſe a day was appointed for the defendant to appear; and upon his appearance, the

the Archons proceeded to elect judges from the *Halieia* by lot, and remitted the cauſe to be tried by them. In their preſence witneſſes were examined, and the parties were heard by themſelves, or by orators who ſpoke for them. The time of ſpeaking being limited by a *clepſydra* (an hour-glaſs dropping water); and when the cauſe was heard, the votes of the judges were given by black and white ſtones, or beans thrown into an urn; and after giving decree, the judges repaired to the temple of *Lycus*, where they depoſited the rods or ſceptres which were the badges of their office; and each judge received for his ſervice in each trial a certain fee, which, according to the Scholiaſt upon Ariſtophanes, amounted to ſix oboli, or 7¾d. Engliſh money.

In Rome, the juriſdiction which had been ſucceſſively veſted in the Kings, the Conſuls, and the Decemvirs, received a ſettled form in the perſon of the Prætors: two of theſe magiſtrates were choſen annually, one for the cauſes of citizens, the other for the cauſes of ſtrangers; and as the written law contained in the Twelve Tables, or in the decrees of the Senate or of the people, could not meet every caſe, the Prætors aſſumed a power of ſupplying, explaining, and even of correcting theſe laws. This they did, by publiſhing edicts at the commencement of their year, containing certain rules and declarations, according to which they were to adminiſter juſtice during the courſe of

their office. As for example, *Prætor ait, parentem, patronum, patronam, liberos, parentes patroni, patronæve, in jus ſine permiſſu meo, ne quis vocet* *.

Theſe declarations being accumulated from time to time, compoſed a diſtinct body of law called the *Jus Prætorium*, and became a perpetual edict.

In the trial of cauſes, the Prætor employed a certain claſs of men ſimilar in ſome ſort to the Athenian *Halieia*. They were in general called *Judices*, although ſuch of them as were delegated to try cauſes depending on conſcience and good faith were called *Arbitri;* and ſuch as tried certain cauſes of poſſeſſion were called *Recuperatores:* The whole claſs was annually nominated by the Prætor: At firſt they were taken from among the Senators; afterwards, by the *Sempronian* law, the privilege of furniſhing judges was extended to the Equeſtrian order: By the *Plautian* law, they were choſen from all the three orders, the Senatorian, Equeſtrian, and Plebeian; but at laſt by the law of *Julius Cæſar*, the privilege was reſtricted to the Senatorian order alone. By the *Servilian* law the number was 450, although this varied at different times.

The general form of proceeding was ſimple: Any party who ſuppoſed himſelf aggrieved, or that he had ground of action againſt another,

* L. 4. § 2. lib. 2. tit. 7. Dig.

might,

might, by his own private authority alone, ſummon the adverſe party before the Prætor's tribunal, in the Forum. *In jus ambula*, or *Sequere in jus*, was the whole ceremonial. This was called the *vocatio in jus;* and the defendant was obliged to obey, otherwiſe the plaintiff, after appealing to thoſe preſent as witneſſes, *(Licet anteſtari)*, might lay hold of him, and drag him, *obtorto collo*, into the *Forum.* When the parties came before the Prætor, the actor, or plaintiff, then declared the nature of his cauſe, *Aio fundum Capenatem quem poſſides meum eſſe ex jure Quiritium.* In this publication of the action, which was called the *editio actionis*, the Roman law was exceedingly nice; *Ita jus civile habemus conſtitutum*, (ſays *Cicero)*, *ut cauſa cadat is qui non quemadmodum oportet egerit* *. The *reus* or defendant was then bound over by giving *vades* (ſureties) to appear upon a certain day, called the *dies perendinus*, (generally the third day thereafter). If he failed to appear, he was ſaid *deſeruiſſe vadimonium*, and judgement went againſt him, as Horace † informs us. *Tum reſpondere vadato debebat; quod ni feciſſet perdere litem.* If he appeared, then came the *litis conteſtatio*, or joining of iſſue; and the Prætor, after ſettling the form of action, and the law or circumſtances upon which the caſe was to be tried, ſelected one or more of the judges above deſcribed, to whom he re-

* De Inventione, 2. Lib. 19. † Lib. 1. Serm.

mitted the *Judicium*, or trial, as thus: *C. Aquili, judex eſto;* ſi paret *fundum Capenatem, de quo Servilius agit cum Catulo, Servilii eſſe, ex jure Quiritium, neque is Servilio a Catulo reſtituatur; tum Catulum condemna* *. And if the defendant excepted to the action, the exception was added to the formula, as thus: *Extra quam ſi teſtamentum prodatur quo adpareat Catuli eſſe.* This judge ſo named, was called *Judex quæſtionis*, and was a ſort of foreman to the others added to him.

Theſe things done before the Prætor, were ſaid to be done *in jure:* what followed, and were executed by the judges, were ſaid to be done *in judicio.*

The judges took an oath of office; the litigants an oath of calumny. The advocates pleaded generally two of a ſide; the firſt ſpeakers on each ſide giving only a general ſummary, called the *Cauſæ conjectio.* The time of ſpeaking, as in *Athens*, was limited by a water-glaſs †.

The witneſſes were examined publicly; and the art of the advocates was diſplayed in the manner of interrogating them ‡.

After hearing the cauſe, the ſuffrages of the judges were collected, and ſentence pronoun-

* Quint. viii. 3. alſo Car. Sig. de Judic. Rom. L. 24. p. 495. Barn. Briſſon. de Form v. p. 370.

† Tully, in his Oration for Murœna; and Budeus, Com. Græcæ Ling.

‡ Cic. de Oratore.

ced

ced according to the opinion of the majority. The ſentence was put to execution by authority of the Prætor, whoſe office was ſaid to be compriſed in three words, *Do*, *Dico*, *Addico*, viz. *Do judices*, I name judges; *Dico jus*, I explain the law to them; *Addico poſſeſſionem*, I adjudge poſſeſſion to the victor.

In the exerciſe of this office, the Prætor in Rome had the aſſiſtance of ten aſſeſſors, whereof five were Knights and five Senators, who, as learn we from *Ulpian*, Fragm. I. 13. were the ſame with the *Decemviri litibus judicandis*, ſpoken of by Pomponius *; but were different from the aſſeſſors, whoſe office is alſo deſcribed by him †.

It is probable the Archons in Athens had aſſeſſors of the ſame kind, men learned in the laws: for the Archons and Prætors, who were ſupreme magiſtrates as well as judges, and held their office only for one year, could not well be ſuppoſed to have the education and practice in law which the office of a judge, and a legiſlator too, neceſſarily requires.

From this ſlight view of the form of exerciſing juriſdiction in *Athens* and in *Rome*, (and it was proper not to go deeper into the ſubject for the preſent), it will appear there was great ſimilarity in the cuſtom of theſe two illuſtrious cities; the latter probably borrowing much

* Lib. 2. § 29. Dig. de Origine juris, as explained by Noodt de Juriſdictione I. 12. p. 137.

† Lib. 1. Dig. tit. 22.

from

from the former. It appears alſo that theſe judges, choſen by lot from certain great claſſes of people occaſionally for trials, were truly jurymen, and had no ſmall reſemblance to the juries in England. The particulars are well deſcribed in the following paſſage. *In urnam ſortito mittuntur, ut de pluribus neceſſarius numerus conſici poſſet: poſt urnam, permittitur accuſatori ac reo, ut ex illo numero rejiciant quos putaverint ſibi aut inimicos, aut ex aliqua re incommodos fore: rejectione celebrata, in eorum locum qui rejecti fuerunt, ſubſortiebatur Prætor alios, quibus ille judicum legitimus numerus compleretur. His perfectis, jurabant in leges judices, ut obſtricti religione judicarent* *. And Tully informs us, *Neminem voluerunt majores noſtri, non modo de exiſtimatione cujuſquam, ſed ne pecuniaria quidem de re minima, eſſe judicem; niſi qui inter adverſarios conveniſſet* †.

This leads to jury-trials in England; and here no more is neceſſary than to take notice of ſome ſtriking circumſtances from which the advantages which that ſort of trial has over all others may beſt appear.

In Athens and in Rome the *Dicaſtæ* and the *Judices* were in a great meaſure judges of the law as well as triers of the truth of facts; but in England the power of judging in law is confined to certain eſtabliſhed Judges, choſen by the Crown from among a claſs of men edu-

* Aſcon. in Cic. Verr. 1. 6. † Pro Cluentio 43.

cated

cated in the ſtudy of the law, and who have dedicated themſelves to the practice and profeſſion of it. Their commiſſions are during life, or good behaviour.

Jurors or jurymen in England are only employed to try the truth of facts, or to judge of intention, or to eſtimate value and damages; though, in caſes where the Judges have explained the law, or where it is plain and needs no explanation, it is left to them by the Judges to apply it to the fact. Their return is not called a ſentence or judgement, but a *vere-dictum*, a verdict or report of truth, which properly applies to fact only; and the ſeparate offices of judges and jury are well defined in this ancient maxim in the law of England, *Ad quæſtionem facti non reſpondent judices; ad quæſtionem legis non reſpondent juratores.*

Theſe jurors, or jurymen, require no particular education, or practice in the law. Skill in law is no way requiſite for trying the truth of facts, and for the diſcerning of men's intentions by their actions, or for eſtimating the amount of damages done, or the value of any matter under queſtion. Common ſenſe, and knowledge in the world, are more requiſite in matters of that kind than ſkill in law. It is ſufficient for a juryman to be *abnormis ſapiens, croſſaque Minerva* *.

It often happens alſo, that the matters in iſ-

* Horace.

ſue

ſue relate to ſome branch of commerce, agriculture, manufacture, or ſcience, in which perſons beſt verſant may be choſen as jurymen. Their general qualification is, that they ſhall be *liberi et legales homines*, having a free-hold or copy-hold of the yearly value of L. 10, or a leaſe for a term of five hundred years abſolute, or for a life or lives, of the clear yearly value of L. 20, over and above the reſerved rent.

In civil actions, which are the ſubject of the preſent inquiry, ſo ſoon as the parties litigants are both in court, the firſt object is, to bring them to join iſſue; that is, to come to a fair contradiction upon the point where the cauſe truly hinges. If this be a point of law, it is called a *demurrer*, and belongs to the Judges. If it is a point of fact, and if parties join in agreeing that it ſhould be inquired of by the country, it is called an *iſſue in fact*, and goes to a jury.

But here it is fit to take notice, that if in this ſtage of the ſuit an objection is ſtated in law, by way of demurrer, the facts, as laid in the declaration, are held to be acknowledged, and cannot afterwards be controverted and go to a jury: For the defendant cannot firſt plead hypothetically on the ſuppoſition of the facts being true, and afterwards, if the point of law be given againſt him, recur to a denial of the facts; and this probably has given riſe to pleading in the beginning, the general iſſue, which

which leaves it open, after verdict, to plead points of law in arreſt of judgement.

The iſſues which go to a jury are either general or ſpecial. The general iſſue is what at once denies the whole libel or declaration, without offering any ſpecial matter whereby to evade it; as in the caſe of any treſpaſs, the general iſſue is, *Not guilty*; in an action for debt, the general iſſue is, *He owes nothing*; or in a bargain, *That he made no ſuch promiſe* *. In a writ of right, (which with us in Scotland is analogous to a declarator of property), the general iſſue means, *That the tenant hath more right to hold than the demandant to demand.* On the other hand, a ſpecial plea is a reſting of the defence upon ſome ſpecial fact or circumſtance which bars or avoids the action; ſuch as, releaſe, an arbitration, condition performed, ſelf-defence, preſcription, &c. including often a mixture of law and fact. Sir William Blackſtone ſays, General iſſues have of late become more in faſhion; and that it is a general rule, That every defence which cannot be ſpecially pleaded may be given in evidence upon the general iſſue at the trial. This, it would ſeem, may occaſion ſome confuſion between the office of Judge and Juryman; but he ſays it has been found convenient, as any confuſion and uncertainty ariſing from it may be remedied by the aid of a new trial.

* Blackſtone, lib. 3. p. 305.

Parties having then joined iſſue by an affirmation upon one ſide, and a denial upon the other, a writ is iſſued by the Court to the ſheriff of the county where the cauſe ariſes, "to ſummon a jury, *liberos et legales homines*, of the body of his country, by whom the truth of the matter may be better known, and who are not of kin to either of the parties, to recogniſe the truth of the iſſue between them."

In caſes of very great weight and conſequence, the jury come to Weſtminſter-Hall, and the trial is at the bar of the ſuperior Court; but in ordinary caſes, there is a clauſe put into the writ, directing the ſheriff to ſummon the jury to Weſtminſter by ſuch a day, *niſi prius*, (unleſs before that day), the Juſtices aſſigned to take aſſizes ſhould come into his county; in which caſe, he is to return his jurors to the Court of Aſſizes to take the trial there. This in general brings the trials of all cauſes depending on fact to be tried at the circuits, in or near the places where the cauſes of the action have ariſen.

Juries are either ſpecial or common: Special juries were originally introduced in trials at the bar of the ſuperior Court, when the cauſes were of too great nicety for the diſcuſſion of ordinary freeholders. But now, by 3d Geo. II. cap. 25. either party is intitled, upon motion, to have a ſpecial jury ſtruck, as well at the aſſizes as at bar, upon his paying the extraordinary expence, unleſs the Judge (in purſuance

ſuance of 24th Geo. II. cap. 18.) ſhall certify that the cauſe required ſuch ſpecial jury.

The method of ſtriking ſpecial juries is, for the ſheriff to attend the Secondary or Maſter, with his book of freeholders, at the time appointed by the Maſter for that purpoſe, who is to give notice to the attornies on both ſides to be preſent. The Maſter then takes forty-eight of the principal freeholders out of the book; from theſe each party ſtrikes twelve; and the names of the remaining twenty-four are inſcribed on a ſmall piece of parchment, called the *panel*, which is annexed to the writ, and returned.

A common jury is one returned by the ſheriff, according to the directions of 3d Geo. II. cap. 25. which appoints, that the ſheriff ſhall not return a ſeparate panel for every ſeparate cauſe, as formerly, but one panel for all the cauſes to be tried at the ſame aſſizes, containing not leſs than forty-eight, and not more than ſeventy-two jurors; and their names being written on tickets, are thrown into a box; and when each cauſe is called, twelve of theſe perſons, whoſe names are firſt drawn out of the box, are ſworn upon the jury, unleſs abſent, challenged, or excuſed, or unleſs a previous view of the lands or tenements, or other matters in queſtion, ſhall have been thought neceſſary by the Court; in which caſe, ſix or more of the jurors returned, to be agreed on by the parties, or named by a Judge, or other proper

officer of the Court, ſhall be appointed to take ſuch view; and then the jurors who have taken the view, are ſworn of the inqueſt previous to any other jurors.

When the jurors are called, they may be challenged by either party on very ſlight grounds of inſufficiency, or of ſuſpicion; even the whole panel may be ſet aſide on any ſuſpicion of inſufficiency or partiality of the ſheriff.

When the number of twelve is made up, they are ſeparately ſworn, " well and truly to try the iſſue, and a true verdict to give, according to the evidence;" and from thence comes their name of *jurors* or *juratores*.

They are then placed in a box or ſeat by themſelves, ſo as no perſon ſhall have communication with them till they are diſcharged of the trial.

The pleadings are then ſtated to them ſhortly by the opening counſel for the plaintiff. The nature of the caſe, and of the evidence intended to be produced, are next fully laid before them by counſel on the ſame ſide. The witneſſes on that ſide are then interrogated publicly in Court. That done, the ſame method is followed on the part of the defendant; and then the party which began has the liberty of making a reply.

During the courſe of trial, the Judges, or Judge who preſides, directs the jury, when any queſtion of law ariſes in the courſe of the trial; and when the plaintiff's counſel has made his reply,

reply, the Judge ſums up the whole evidence on both ſides; making, as he goes along, ſuch obſervations as appear to him pertinent, and material for the conſideration of the jury; after which, before ſeparating, and without taſting meat or drink, or having fire or candle, unleſs by permiſſion of the Judge, the jury muſt return their verdict, in which it is neceſſary they be unanimous.

This verdict is either general, when they find ſimply for one of the parties; or it is ſpecial, when they return a ſpecial account of the naked facts which they find proved, and pray the advice of the Court thereon; concluding, That if, upon the whole matter, the Court ſhall be of opinion that the plaintiff had cauſe of action, they then find for the plaintiff; if otherwiſe, then for the defendant. This is entered at length in the record, and afterwards argued and determined in the Court at Weſtminſter from whence the iſſue came to be tried.

If a jury ſhall bring in a falſe verdict, they are liable to be tried by an extraordinary jury, called the *Grand Jury* in the attaint. This jury conſiſts of twenty-four; and if they ſhall find the former verdict a falſe one, the party is not only reſtored to all that he loſt by reaſon of the unjuſt verdict; but the jury who pronounced it ſuffer an attaint, by which they become infamous, and forfeit their whole goods and chattels;

chattels; and their lands and tenements are ſeized into the King's hands.

But if the petty jury ſhall only have made an involuntary miſtake, the cauſe, by allowance of the Court, may be tried over again by another jury, in the ſame manner as by the firſt. The ſeverity of an attaint is ſo great, that this laſt method of a new trial by a petty jury is commonly followed.

Who wiſhes to know more particularly the hiſtory and nature of jury-trial in England, may conſult Sir William Blackſtone's Commentaries, lib. 3. cap. 23. and Mr Juſtice Buller's Introduction to the Law relative to Trials at *niſi prius*. In the mean time the preceding outlines of this branch of the law of England, it is thought, will be ſufficient to demonſtrate the excellence of jury-trial over every other kind, and particularly over that kind where the trial of the fact, as well as of the law, is left to eſtabliſhed Judges, even the moſt learned and impartial.

In the *firſt* place, It appears the excellence of this mode has been recogniſed by three of the moſt illuſtrious and renowned ſtates which have graced the hiſtory of the world, Athens, Rome, and Great Britain; Great Britain, including Scotland as well as England, for both theſe kingdoms have immemorially enjoyed the privilege of jury-trial; although, about 250 years ago, James V. of Scotland, introduced into the Scots civil courts the French method of

of taking evidence by inqueſt, and reducing it into writing. And in 1626, Charles I. made a regulation, " That no perſon ſhould remain " in court and be preſent while the Lords of " Seſſion were adviſing cauſes, or voting, ex- " cept the clerks of court *." But by the 26th act of 4th ſeſſion of William and Mary's 1ſt parliament, in 1693, that ſlaviſh law was annulled; and it was enacted, " That all cauſes ſhould be conſidered, reaſoned, adviſed, and voted by the Lords of Seſſion, with open doors, where the parties procurators, and all others, might be preſent." Perhaps it is reſerved for the preſent happy reign of George III. to complete the ſyſtem of liberty, by reſtoring to Scotland her ancient privilege of jury-trial in civil cauſes.

2*dly*, The great characteriſtic of jury-trial, in contradiſtinction to the other method, is, that it includes a certain rotation in the office of jurors. The advantages of this are infinite. By this rotation, the man who is a juryman to-day, and tries the life, liberty, or property of his neighbour, becomes a private man ſo ſoon as the trial is over, and may himſelf be a party to-morrow. The impreſſion which this has on the mind ſecures impartiality even in arbitrary times, nay more in arbitrary times than in any other: For in ſuch times juries conſider themſelves to be the bulwark of liber-

* Spottiſwoode's Practicks, p. 368.

ty.

ty. In the execution of this office, every man feels a connection with the conſtitution: he feels himſelf a neceſſary and important part of it; and by rotation this feeling is communicated over the whole kingdom, and contributes to keep alive that love of liberty which has ſo long preſerved the conſtitution of Great Britain, and will, it is hoped, make it immortal. This mode of trial is well denominated a trial *par pais*, that is, by the country; for the whole country are jurymen in turn.

Theſe are ſtrong motives for upright action in the conduct of jurymen; and they are ſupported, on the other hand, not only by fear of the attainder above mentioned, in caſe of bringing in a falſe verdict, but alſo in caſe of ſhowing any the leaſt partiality, of the total loſs of character and reputation among their neighbours: for any injuſtice done by jurymen is obvious and open to the whole country: it lies in matters of fact, of which every man is a judge: it cannot be gloſſed over like a matter of law, nor covered by ſophiſtry and artificial arguments.

Different is the ſituation of Judges in the law, who in arbitrary times are apt to conſider themſelves as inſtruments of adminiſtration. Their errors, however deeply felt, yet are more difficult to be underſtood and expoſed: their rank and ſituation overawes challenge, and excludes inquiry and diſquiſition.

In the *third* place, It has been already proved,

ved, that the public examination of witneſſes in preſence of the Court and of the parties, has infinite advantages over evidence taken in writing by commiſſioners, or even by the Judge. In ſhort, that the firſt method is the moſt certain for the diſcovery of truth; whereas the latter may be, and often is, the very reverſe. Now, jury-trial neceſſarily includes the public examination of witneſſes; whereas trial without jury is generally attended by the other method, viz. reducing the evidence to writing, and employing commiſſioners for that purpoſe.

This circumſtance alone ſhould decide the queſtion: For if the diſcovery of truth be abſolutely neceſſary to the doing of juſtice, as it certainly is, that method of trial is ſurely the beſt which neceſſarily includes the more certain method of diſcovering the truth of fact.

Add the following eſſential circumſtance, that the jury have, not only the benefit of ſeeing and hearing each witneſs, and of judging of the manner in which they give their evidence, but alſo the proof is taken before the jury *unico contextu*. They decide upon it while freſh in their minds; and they have an opportunity, ſhould any thing be doubtful, of confronting, and re-examining, and getting explanations from the witneſſes themſelves. What they hear and ſee has a much warmer impreſſion upon their minds than the cold reading of a report. It alſo happens often in Circuit-trials, that the

jury are acquainted with the characters of the witneſſes who generally live in the ſame county with them.

And theſe things, in the *4th* place, lead to another advantage, namely, The great ſaving of time and expence. The ordinary courſe of jury-trials in England does not conſume above one, two, or three hours. It is true the preparatory ſteps of ſtating the caſe in written pleadings, which proceed in the ſuperior courts in Weſtminſter-Hall, conſume ſome time, more or leſs according to the nature of the caſe. But, in general, as theſe pleadings contain only the aſſertions of parties, in law or fact, without argument, they go on as matters of courſe, and in many caſes, as it were mechanically, without the interpoſition of the Judge, till the cauſe comes before him for trial at the Circuit. Indeed, where queſtions ariſe in law upon the relevancy in the preparatory ſteps, theſe are argued at the bar *viva voce*, and take up much leſs time in England, as they ſtand clear of the facts, and do not go to writing or to print. After cauſes come before the jury, two or three hours, as has been ſaid, are in general ſufficient for the whole trial, from the opening of the caſe to the final verdict. Many trials of the utmoſt importance and perplexity are concluded in ſix or ſeven hours; and few, very few, are known to ſtand above a day.

But what confirms the aſſertion is, that in all

all cauſes, in the common law of England, exceeding the value of 40 s. every proof is taken in preſence of one or more of the Twelve Judges, and of a jury; yet it is not thought their office is more laborious than the office of the Scots Judges in the Court of Seſſion, who, except in the caſe of forgeries, ſeldom witneſs the taking any proof at all. And this is the farther elucidated by this circumſtance, that except the cauſes ariſing within the city of London and Weſtminſter, moſt of the trials from the other parts of England come before the Circuits; and yet the Judges ſeldom conſume above three or four days in any of the circuit-towns; and in that time they diſcuſs the whole civil and criminal buſineſs that has ariſen within the diſtrict for the preceding half-year. Suppoſing this a burden, it is ſurely a very light one on jurymen, who come by rotation, perhaps only once in the courſe of four or five years.

As to the expence, each common juryman is only intitled to ~~a ſhilling~~ in each trial, and each ſpecial juryman to a guinea at moſt. This is a mere trifle, when compared with the expence of proofs upon commiſſion, as ſhall by and by be explained more fully, in treating of the mode of taking proof in Scotland. There is alſo this advantage, and it is no ſmall one, attending upon this mode of trial, that the Judge's being obliged to ſum the evidence makes a clear diſcovery, whether he has underſtood

the cauſe. Unleſs parties are ſatisfied their cauſe has been underſtood, they never can be ſatisfied that they have got juſtice. Nothing, in general, more engages and agitates mens minds, than trials of every ſort. Crowds are drawn together upon the occaſion. Every man erects himſelf into a Judge; and he tries, not only the cauſe, but the Court. The parties are anxious to collect the public voice, and by it are diſpoſed to complain of or to acquieſce in the judgement. This will by no means apply to trials by written proceedings, where the audience have not the opportunity of comprehending the cauſe, or of underſtanding what is ſaid by the Court.

Sir William Blackſtone*, among other eulogiums which he beſtows upon jury-trial, obſerves, "That, beſides other vaſt advantages "which he mentions, it is alſo as expeditious "and cheap as it is convenient, equitable, and "certain: for a commiſſion out of Chancery, "or the Civil-law courts, for examining wit-"neſſes in one cauſe, will frequently laſt as "long, and of courſe be full as expenſive, as "the trial of an hundred iſſues at *niſi prius*; "and yet the fact cannot be determined by "ſuch commiſſioners at all; no, not till the "depoſitions are publiſhed, and read at the "hearing of the cauſe in court.

"Upon theſe accounts the trial by jury ever

* Vol. 3. p. 378. quarto edition.

"has

" has been, and I truſt ever will be, looked " upon as the glory of the Engliſh law. And " if it has ſo great an advantage over others " in regulating civil property, how much muſt " that advantage be heightened when it is ap- " plied to criminal caſes! But this I muſt re- " fer to the enſuing book of the Commentaries; " only obſerving for the preſent, that it is the " moſt tranſcendant privilege which any ſub- " ject can enjoy or wiſh for, that he cannot be " affected, either in his property, his liberty, " or his perſon, but by the unanimous conſent " of twelve of his neighbours and equals: A " conſtitution that I may venture to affirm has, " under Providence, ſecured the juſt liberties " of the nation for a long ſucceſſion of ages; " and therefore a celebrated French writer *, " who concludes, that becauſe Rome, Sparta, " and Carthage, have loſt their liberties, there- " fore thoſe of England in time muſt periſh, " ſhould have recollected, that Rome, Sparta, " and Carthage were ſtrangers to the trial by " jury."

If what has been above remarked from ancient reliques, concerning the Grecian *Halicia* and Roman *Judices*, be juſt, perhaps Sir William Blackſtone's partiality for Engliſh juries here carries him too far. Temperance and a good regimen may prolong life in the natural body; good laws will do the like in the

* Monteſq. Spirit of Laws.

body-

body-politic: but ſocieties are compoſed of men, and men are made of corruptible and mortal materials: Regimens of health, and conſtitutions of laws, even the beſt, are only human ſyſtems; and no human ſyſtem ever can endow corruptible and mortal materials with immortality.

Having gone over the four general preliminary queſtions propoſed, and juſtified the propoſitions maintained by the example of the moſt celebrated free ſtates, it is now time to conſider the particular ſubject of this inquiry, namely, the mode of taking and trying evidence in Scotland, and whether it be expedient to make any, or what alterations upon that mode:—In other words, whether it be fit and expedient, in certain civil queſtions, to introduce jury-trial, or rather to revive it, in Scotland.

Before particularly deſcribing the preſent mode of taking and hearing of proof now in practice before the Court of Seſſion, it ſhall be obſerved, that it is certain that in the ancient conſtitution of Scotland the Grand Juſticiar had juriſdiction in matters civil as well as criminal; and jury-trial was employed indifferently in both, as well in other courts as before the Juſticiary. This is clear from the *Regiam Majeſtatem*, lib. 1. cap. 12. 13. and 14. * where the whole order of proceeding is laid down,

* Quon. Attach. *paſſim.* ſtat. William, c. 4. 5.; ſtat. 1. Ro. I. c. 6. § 2.; Ro. III. cap. 36.

and

and appears very ſimilar to that of England at this day; particularly in the number of jurors, viz. twelve, and that they ſhould be unanimous. And although ſummonſes were uſed in civil caſes, both by the old Court of Seſſion of James I. *, and by the Daily Council of James IV. and proofs were taken before theſe Courts; yet that juries remained in uſe alſo in theſe Courts, is not matter of doubt. This appears particularly in caſes mentioned by Spottiſwoode, in his Practicks †, and in Balfour ‡. The ſame thing appears from various acts of parliament relative to pleadable brieves, falſing of dooms, and the errors of aſſizes, viz. the acts 1471, cap. 41 & 47.; 1475, cap. 63.; and 1503, cap. 94.

Theſe acts, taking for granted the common uſe of juries, not only in criminal, but in civil caſes, lay down rules for puniſhing the wilful errors of aſſizes and inqueſts, referring for the puniſhment to the King's laws in the firſt book of *Regiam Majeſtatem*; and declaring that the King ſhall give them a great aſſize of twenty-five Noble perſons for their trial. This is ſimilar to the grand aſſize for attaint in the law of England above mentioned, and proves irrefragably the common uſe of jury-trial anciently in the whole Civil-law courts in Scotland. But after the inſtitution

* 1457. cap. 62.
† P. 360. and 361.
‡ P. 304. 443. and 496

of

of the College of Juſtice by James V. in 1532, ſummonſes, as has been ſaid, having become more common, and the general uſe of brieves in civil actions being diſcontinued, jury-trial in civil matters was not uſed in the Court of Seſſion, and was gradually laid aſide in the inferior courts of judicatory.

In one particular, however, it appears to have been retained in the preſent Court of Seſſion: for, in 1580, that Court made an act of ſederunt, ſetting forth, "That the expediting and diſpatch of actions in weighty matters of heritage, and others of great importance, which were moſt fit to be decided by them, was often much retarded by the number of actions of moleſtation in diſputes concerning marches and commonties, "which of old uſed to be deci-"ded by the ſheriffs of every ſhire, bailies of "regalities, and other ordinary judges where "the lands lie, and by the determination of "an aſſize of the beſt and worthieſt of the "country:" Therefore they revived that inſtitution, and ordained cognition and trial to be taken in all caſes of that ſort by jury, in manner ſpecially ſet forth in their act, which was confirmed by act of parliament in 1587, c. 42. But even this regulation is ſince in deſuetude, as well as jury-trial in other civil caſes.

The mode ſubſtituted in place of jury-trials was this: Points of relevancy, that is, queſtions of law, were firſt of all determined upon ſuppoſition,

ſuppoſition, in the mean time, that the facts and circumſtances alledged by the purſuer or defender were true. If the facts alledged were found frivolous or irrelevant, even upon the ſuppoſition of their being true, there was an end of the matter, and the cauſe was diſmiſſed. If otherwiſe, then the points to be proved were ſettled, and an order was made, allowing a proof, and containing a warrant for ſummoning the witneſſes. This is called an act of litiſconteſtation.

Here we differ much from the forms of England, obſerved above; for with us the pleading points of law and relevancy, on the ſuppoſition of the facts being true, does not, as in England, bar the defender, if the law-point is given againſt him, from recurring to a denial of facts whereof the admiſſion in the firſt ſtage of the ſuit was only hypothetical. In circumſtantial caſes, where law and fact are much mixed, it is now much the practice to deny both law and fact together, which is like pleading the general iſſue in England; and the Judge, without giving judgement on the law, gives warrant for a proof, which is called *an act before anſwer*.

The warrant for proof being iſſued, according to the original practice of the Court of Seſſion, the witneſſes were ſummoned to Edinburgh, and their evidence taken by two of the Judges, weekly delegated in turn upon that

duty, from which they were for the time denominated *the Lords Ordinaries on the Oaths and Witneſſes;* and they attended upon the buſineſs in the afternoon, that it might not interfere with their daily attendance upon the Court in the forenoon.

The proof being taken by one or both of theſe Ordinaries, came next into the hands of another Ordinary, called the *Ordinary upon Concluded Cauſes* *, who was alſo appointed weekly in turn. By his direction, the depoſitions of the witneſſes were ranked in due order, leaving out what was ſuperfluous; and the ſtate of the proof being thus prepared, it was called *a concluded cauſe*, and was laid before the whole Court; and if the caſe was not clear, counſel were heard upon it, and the Court pronounced their decree, which was ſubject to review, in manner mentioned in the firſt part of this Paper.

This method of taking proof by an inqueſt of two of the Judges, was probably borrowed from the model of the parliament of Paris, and is ſimilar to the mode of proceeding in the *Chambres des Enquêtes* at this day.

But in proceſs of time law-ſuits having multiplied, it became impoſſible for the Ordinaries on Oaths and Witneſſes, and the Ordinary upon concluded cauſes, both to diſcharge theſe duties, and to attend to the general buſineſs of

* Act 1693, c. 17.

the

the Inner Houſe, which, as has been demonſtrated, has become ſo great, that, without exaggeration, it would require, at an average, eight or nine hours daily reading at home, by way of preparation only, for the buſineſs in Court, as has been ſhown in another place.

No diviſion into Chambers has hitherto been made, as in the parliament of Paris; but every ſingle Judge in the Court of Seſſion muſt be fully prepared by reading, and muſt daily judge in the buſineſs of the whole Court. What has been the conſequence? In place of *acts of litiſconteſtation*, for determining the relevancy, and ſettling diſtinctly the ſeparate points of fact that are to be the ſubject of proof, the Court is generally ſo hurried, that *acts before anſwer* (which in Lord Stair's time were reckoned an exerciſe of the *nobile officium* of the Court) have now come in faſhion to be pronounced almoſt in every caſe; that is, the queſtions of relevancy are ſuperſeded till the facts alledged ſhall appear in proof. The taking of the proof is referred to commiſſioners, generally two perſons, that is, one named by each party, for taking their reciprocal proofs; or failing them, the ſheriff of the county, or his ſubſtitute, or ſome juſtice of peace in the neighbourhood. It is more agreeable to ſay what may be, than what too often is the conſequence of this manner of proceeding: Witneſſes without end admitted to be examined; infinite extraneous matter

brought into the evidence; and the whole evidence too often mangled and miſ-ſtated by inadequate commiſſioners. Add to this, the collecting of a multitude of people for days and weeks together, to eat and drink at the expence of the parties, and all upon the idea to ſave the charges of taking the evidence in Edinburgh before the Court!

Thither at laſt it comes by report, not prepared by a Judge-Preparer as formerly, when there was much leſs need for it, but the whole depoſitions mixed together as they were taken, without being put in any order, or the ſuperfluous matter left out.

Memorials are then made up, ſigned by counſel, but oftentimes the work of inferior practitioners, being long eſſays upon the whole law, and diſcuſſions upon the import of the whole evidence in the caſe, in one complex view. Theſe are printed, and copies of the proof annexed, upon all which counſel are heard *viva voce* at the bar; and the Judges muſt read the whole evidence, in order to be ſatisfied that it is not miſ-ſtated in the memorials, as well as liſten to the arguments of the counſel, which often take the cauſe up upon a footing totally different from what is ſtated in the memorials. What a conſumption of time and waſte of expence! what a burden upon the patience and conſtitution of Judges! The conſequences of this mode of proceeding will perhaps

haps be beſt underſtood from a late example *.

In a contract made between the occupiers of two neighbouring coal-mines, for the purpoſe of making an exchange of ten acres of unworked coal, for mutual convenience, after one of the parties, whoſe coal lay much deeper under the ſurface than the other, had excavated a conſiderable part of the ground agreed to be exchanged, the other party in the ſuperior coal began to ſink a pit, which the firſt feared would open a paſſage for the water of the ſuperior coal-mine into the level of his, the inferior one; by which means, it was alledged, the inferior muſt either have been drowned, or its engine be burdened with drawing up the whole water coming from the ſuperior coal. In an action at the inſtance of thoſe intereſted in the inferior coal, a queſtion aroſe, firſt upon the conſtruction of the contract, Whether it imported a communication of level? at leaſt, as nothing was provided to the contrary, Whether the defenders had a right to work to the very edge of their march, without leaving any barrier to ſtop the communication of the water? And, in point of fact, it was diſputed, Whether, previous to the contract, there had been an old barrier between the two coal-works? Next,

* John Grieve and Partners of the Grange Coal-company, *againſt* the Duke of Hamilton, owner of the coal of Borrowſtounneſs, and Dr John Roebuck, his leſſee.

Whether

Whether the pit propoſed to be ſunk would affect the inferior coal in the manner feared? and, Whether a communication of level was the neceſſary conſequence of a communication of waſtes?

The diſpute aroſe in the year 1781. In March 1782, a proof was allowed to be taken upon commiſſion. In November 1783, the proof commenced, and, though under the direction of a moſt unexceptionable commiſſioner, laſted near two weeks. A ſtate of the proof was made up; memorials were written by able counſel; a hearing in preſence at the bar followed, and laſted from day to day for near three weeks. An additional proof was found neceſſary, which was taken in like manner upon commiſſion, and laſted ſeveral days; and this was followed by a ſecond hearing in preſence of the whole Court, which continued from day to day for two weeks; and after all a farther ſurvey and report were found neceſſary. There had been ſeveral plans made before that time, and the proceedings filled about ſix hundred 4to pages of print. The cauſe ſtill ſtands undecided.

But laying out of the queſtion the time occupied in the preparatory ſteps, it is paſt a doubt, that the time employed in taking the proof, and hearing counſel upon it, beſides the breathing times between, has not come to leſs than two months, which, had the cauſe been tried by a jury, as in England, could not well have

have exceeded one day's work. This is a recent caſe, ſtill depending; and the truth of the above particulars may be eaſily known. The evil was no way the fault of the Court, upon which cauſes of this kind are a miſerable load; nor was it imputable to any cauſe, other than being the neceſſary conſequence of the forms of the Court, and mode of taking and hearing evidence.

Let this caſe be contraſted with a caſe which happened to be tried in the year 1786 *, at the autumn-aſſizes in Carliſle. The owners of certain fiſhings in the river of Eden ſued certain leſſees of inferior fiſhings upon the ſame river. Their complaint was, That the defendants had ſet up certain ſtells or poles of wood, upon which they faſtened nets acroſs the river from ſide to ſide, which were alſo faſtened at the bottom by ſhorter ſtakes; and that, by theſe means, not only the ſuperior fiſhings were greatly prejudiced, if not totally deſtroyed, but alſo the free navigation of the river was ſtopped, the boats which they employed in paſſing up and down being often deſtroyed and ſunk by means of the ſtells.

The defendants pleaded a general right of fiſhing in their title-deeds, ſupported by long poſſeſſion. Plans of the fiſhing, and models of the ſtells, were upon the table; and the jury had taken a previous view.

* Robinſon *contra* Leſſees of Lord Lonſdale's fiſhings in the river Eden.

Several

Several queſtions of law occurred, which were determined by the Judge in the courſe of the trial, viz. queſtions concerning the nature of the defendant's original right; concerning the nature of navigable rivers; and indeed almoſt every queſtion that ever occurred in a fiſhing-cauſe: A full proof was taken in preſence of the jury; ſome of the moſt able counſel in England were heard at length; the evidence ſummed up by the Judge, and a verdict returned by the jury for the plaintiff: The whole did not laſt above ſeven hours.

This caſe was, beſides, ſaid to be a caſe of humour and ſpirit, in which the paſſions of the parties had been ſo much engaged, that this was the third trial which, with little variation, had happened concerning theſe fiſhings.

As it is neceſſary completely to elucidate the propoſitions which have been aſſumed, other two caſes, both Scotch, ſhall be compared, one of which was tried in the Commiſſary-court, where the proof was taken by the Court itſelf, but was taken in writing, and at adjourned meetings; the other, in the Court of Juſticiary, where all caſes are tried by jury.

The firſt was the caſe of two married ladies *, who happening to fall out upon ſome very trivial matter, (as one of them alledges), the other took liberties with her character, charging her with certain gallantries of an ancient date.

This having come to the ears of the party defamed,

* Scott *contra* Baillie.

defamed, ſhe, in the year 1783, commenced a proceſs of ſcandal againſt the defamer, and alſo againſt her huſband, before the Commiſſary-court, where cauſes of this ſort come in the firſt inſtance.

The defender pleaded, ſhe had not ſpoken from malice or ill-will, having only repeated common report. She pleaded alſo compenſation of injuries; alledging the purſuer was the author of an anonymous pamphlet on the ſubject of calumny, injurious to the defender's reputation. The ſuit was carried on with great humour and obſtinacy. Almoſt every interlocutor of the Commiſſaries was made the ſubject of an advocation to the Court of Seſſion, which judges in the ſecond inſtance. A proof of the purſuer's ſummons afterwards proceeded, and came out clear.

The defender then offered to juſtify, by proof of the *veritas convitii*, or truth of the ſcandal, and founded, beſides, upon common fame.

The Commiſſaries found her plea irrelevant; but their interlocutor being brought by advocation before the Court of Seſſion, the Court found the defence of *veritas convitii* competent in this cauſe; which they remitted to the Commiſſaries, with an inſtruction, to allow the defenders a proof of certain ſpecial articles; but reſerved conſideration of the competency of the general allegation concerning report until the other proof was concluded.

From that and from other four judgements of the Court of Seſſion, as well as from three other interlocutors of the Commiſſaries, the defender took an appeal to the Houſe of Lords. That ſupreme judicature diſmiſſed the appeal, and affirmed the interlocutors complained of.

The defender then had her proof taken; and the Commiſſaries, in September and November 1786, and March and April 1787, pronounced their interlocutors, finding ſufficient evidence that the defender was guilty of the ſcandal, and refuſing to allow the defender a proof of general report; and finding her liable in L. 500 damages, and judicially to repeat and ſubſcribe a palinode, and to pay near L. 800 of expences to the purſuer, beſides a fine to the fiſcal of L. 300, to be reſtricted to L. 100 in caſe of her judicially repeating and ſubſcribing the palinode. They acquitted the other defender, the huſband, with L. 5 expences.

Theſe judgements, like the former, became the ſubject of ſeveral bills of advocation, and of a bill of ſuſpenſion to the Court of Seſſion, complaining, not only of the ſentence of the Commiſſaries upon the merits, but alſo of a precipitancy in certain parts of the procedure, and alſo of their refuſing a proof of the general reſerved articles concerning common report; and farther pleading, That ſuppoſing all the judgements of the Commiſſaries were to be affirmed, no execution could paſs againſt the huſband's eſtate for the ſums decreed againſt the

the wife, nor againſt the wife herſelf during the coverture.

After a variety of procedure, and much litigation in the Court of Seſſion, the queſtion, Whether to allow a proof of the general report? came to a hearing in preſence upon the 4th, 5th, and 6th of Auguſt 1789; and the Court refuſed to allow that proof.

The other queſtions upon the merits, and how far the huſband's eſtate can be liable for the wife's delict, or the wife herſelf ſubject to execution during the coverture, ſtill ſtand over.

Thus, after ſix year's dependence in the Commiſſary-court and Court of Seſſion, to which laſt the cauſe was brought ſeven different times by bills of advocation, and once by bill of ſuſpenſion; near 800 4to pages of print, beſides written pleadings; ſeveral hearings in preſence, and one appeal to the Houſe of Lords, all which has not coſt under L. 1000 a-ſide; the cauſe is not yet finiſhed.

The other caſe, with which that caſe may be contraſted, was tried in this year 1789, before the Court of Juſticiary. It was the caſe of his Majeſty's Advocate againſt Thomas Hall; the which indictment charged Hall with having fraudulently taken a leaſe of a ſhop in the city of Edinburgh, in company with one Jenkins, for the ſeeming purpoſe of carrying on a fair trade in that ſhop as linen-drapers and merchants; and under that falſe pretence, du-

ring the courſe of the months of June, July, and Auguſt 1788, obtaining from linen-drapers, and other merchants, articles of goods, to the amount of L. 600 or L. 700, ſmall parts of which they paid, and gave bills for the remainder; and when a ſufficient collection of theſe goods was made, privately packing them up, and eloping with them to London, where Hall was apprehended, moſt part of the goods recovered, and he brought back to Edinburgh to ſtand trial.

When the trial came on in January 1789, an objection was ſtated for the priſoner, that the act of 30th Geo. II. commonly called the *Swindling Act*, upon which the indictment was partly laid, as well as upon common law, did not extend to Scotland, which put off the trial for ſome time; and the Court, after adviſing memorials *hinc inde* on the queſtion, found, "That the act of the 30th Geo. II. does not extend to Scotland; and that the indictment, ſo far as laid on that act, was not relevant; but that the indictment was relevant, ſo far as laid on the common law."

Upon the 9th February 1789, the trial proceeded, and the proof was taken, and the jury returned a verdict, finding the libel proved; but, by an overſight, omitted to mention the priſoner's name; by which means the Court were under the neceſſity of acquitting him.

It happened, however, that the whole acts of ſwindling had not been charged againſt Hall;

Hall; ſo a ſecond indictment was brought againſt him, conſiſting of eleven or twelve new articles, for which he was again, upon the 20th July 1789, brought under trial, which laſted ſeven or eight hours; and the jury returned a verdict, finding Hall guilty. The ſentence was tranſportation for fourteen years.

This example of Hall's caſe is given, becauſe there was a ſecond trial, which ſeldom happens. Both trials were but two days work, beſides the time taken by the Court for adviſing the informations upon the ſwindling act.

It will be admitted, that, at a moderate computation, had the whole days beſtowed in the two Courts upon the ſcandal-caſe been put together, they would not have amounted to leſs time than two months; and yet it is very clear that caſe might have been tried twice over by a jury in the ſame period of time as was taken to try the ſwindling caſe, and at leſs than a twelfth part of the expence.

Again, if the ſwindling caſe had been tried in the ſame manner as the ſcandal-caſe, and between parties as litigiouſly diſpoſed, and as well ſupported with money, it is perfectly clear, there were ſufficient materials to have ſpun out the litigation, perhaps to a period as long as was conſumed in the other.

The delay in the ſcandal-caſe in the Court of Seſſion will not be imputed to the Judges, who were in effect the ſame as in the ſwindling caſe,

caſe, the Commiſſioners of Juſticiary being alſo Lords of Seſſion.

Theſe inſtances will at leaſt ſerve to confirm the arguments which have been maintained concerning the excellence of jury-trial beyond every other method; which, if it admits of time enough for Judges to inveſtigate the facts and comprehend the law, what need of farther time? The Engliſh are known to be a wiſe people; they never would ſubmit their lives, their liberty, and their property, to a mode of trial that did not afford ſufficient time for finding out the truth of the fact, and for diſcuſſing the law and applying it to the fact.

Sir William Blackſtone takes notice of a Scots caſe in the following words*: "Not many years "ago, an appeal was brought to the Houſe of "Lords from the Court of Seſſion in Scotland, "in a cauſe between Napier and Macfarlane: "It was inſtituted in March 1745, and after "many interlocutory orders and ſentences be-"low, appealed from and re-heard, as far as "the courſe of proceedings would admit, was "finally determined in April 1749. The que-"ſtion being on the property of an ox, adjud-"ged to be of the value of three guineas. No "pique or ſpirit could have made ſuch a "cauſe, in the Court of King's Bench or Com-"mon Pleas, have laſted a tenth of the time,

* Vol. 3. p. 392.

"or

" or have coſt a twentieth part of the ex-
" pence."

The reaſons which have been aſſigned would ſeem ſufficient for a re-introduction of jury-trial into the civil law of Scotland, even upon a plan almoſt as general as in England. Such a plan, however, is not propoſed; the preſent object goes little farther than the propoſition copied from the Suggeſtions into the firſt page of this chapter; and the full extent of it is, 1mo, *That in all actions concluding for reduction or reſtitution, or for damages or diſabilities on the head of fraud or injury, or in other cauſes of great importance and perplexity brought before the Court of Seſſion, when the evidence depends on parole-teſtimony, it ſhall be lawful for the ſaid Court, if they ſee fit, to make and iſſue an act or order, for appointing the trial to be by jury.*

2dly, *That the granting or not granting trial after this mode in any caſe, ſhall be entirely in the diſcretion of the Court.*

3dly, *That where theſe caſes ſhall ariſe within the ſhires of Edinburgh, Linlithgow, or Hadington, (which are not comprehended in any of the Circuits), the trials ſhall proceed at Edinburgh at ſittings in the laſt week of the ſummer, and laſt week of the winter ſeſſions; and when they ariſe within any of the other counties in Scotland, they ſhall be tried at the Circuits.*

Theſe are the great lines of all that is propoſed as an experiment.

It

It will readily occur with regard to the nature of the cauſes here mentioned, viz. caſes of *fraud*, that of all others they do moſt call for trial in the method propoſed.

It is admitted, that jury-trial is the fitteſt for criminal caſes. No man ever dreamed of laying it aſide in our Criminal Court. Now *fraud* is of a criminal nature, *Sapit naturam delicti*, to which jury-trial of right belongs in Scotland as well as in England: For in the criminal law it is held to be the palladium of liberty.

Farther, actions charging fraud are generally moſt litigiouſly diſputed; and being of a delicate nature, and depending upon *intention*, Judges would often wiſh to have the ſupport of a jury in them.

There are other caſes of great importance and perplexity, which would ſeem alſo beſt extricable by this ſort of trial: Of this, the above-mentioned caſe of the coal-mines, is a fit example; and as the determination of the mode of trial is left entirely to the diſcretion of the Court, it is not thought there will ever be any difficulty in the choice. Nor will the number be conſiderable; for looking back for the laſt five years, viz. 1784, 1785, 1786, 1787, 1788, into the rolls of concluded cauſes, (which have been above deſcribed to be the cauſes where long parole-proofs have been taken, and which have been conſidered to be of ſuch importance, as to require a *viva voce* hearing in preſence

preſence of the whole Court), the average number, for theſe five years, is preciſely twelve: Now ſuppoſing moſt of theſe cauſes ſhould be thought to fall under the preſent Propoſal, and that, with others, the whole ſhould amount to the dozen, or even to a few more, it would be no hardſhip for the three counties above mentioned, which are not included in any of the preſent Circuits, to furniſh jurymen by way of Home-Circuit, at certain convenient ſeaſons, for all the caſes ariſing within their limits. Mid-Lothian particularly, which at preſent has rather an unequal burden of the trials that proceed at Edinburgh, might perhaps, upon the whole, have even ſome relief, by laying part of the burden upon the other two counties.

In England, the exerciſe of this duty is reckoned matter of great privilege and dignity; and beſides, men of buſineſs, when interrupted, by being on ſpecial juries, from following after their own affairs, are amply conſidered for their loſs of time. There is no reaſon for a different rule in this country.

And let it not be thought that this is making much ado about a dozen cauſes; ſeeing, if three of the twelve be ſuch as the coal-cauſe, and ſcandal-cauſe above mentioned, the trying them according to the preſent mode, may be reckoned equal to little leſs than a ſix months work of the Court, beſides proof and preparation out of Court; whereas, in the other way, they might be finiſhed in ſix days.

This is no light matter for the parties concerned: It is alſo an evident loſs of emolument to the body and profeſſion of the law in every claſs, as a multitude of other cauſes muſt, in the mean time, ſtand ſtill.

As theſe are the whole general heads propoſed, and even theſe to be entirely in the diſcretion of the Court, it might, in ſome ſenſe, ſeem ſuperfluous to enter into a diſcuſſion of the general objections to jury-trial, or of particular objections ariſing in the law of Scotland, applicable only to cauſes not intended to be included in the preſent plan. But as there are no objections of any weight, even to a much more extended plan, and as all objections may, in ſome ſenſe, be thought to bear even againſt a limited one, it is fair and fit to examine every thing that may be ſtated, and there is no reaſon to fear meeting opponents upon any ground.

At the head of that liſt, it may be fit, firſt of all to take notice of the opinion of a late learned Judge; who, in one of his law-tracts*, entitled, *Hiſtory of Courts*, lays it down as a maxim of our law, "That although queſtions "of law may be truſted to the deciſion of one "Judge, becauſe he is tied down to a preciſe "rule, yet matters of proof are ſafeſt in the "hands of a plurality:" and he *conjectures* that our preſent Court of Seſſion was made to conſiſt of ſo large a number as fifteen Judges, with

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* Vol. I. p. 407.

a view to prevent the neceſſity of trying cauſes by juries: (Here his Lordſhip preſumes no juries were employed in the old Court of Seſſion, inſtituted in 1425, in which he is miſtaken, as appears from the caſes recorded in Spottiſwoode's Practicks, p. 360. and 361.) Then he adds, " That the preſent Court of Seſſion is conſidered to be the grand jury of the nation *in civilibus*;" and he declares it to be his opinion, " That in civil cauſes it is a *real im-* " *provement, to truſt with eſtabliſhed Judges* the " power of deciding upon facts, as well as " upon law;" (for, argues he), " A number " of men trained up to law, and who are " daily in the practice of weighing evidence, " may undoubtedly be more relied on for " doing juſtice, than the ſame number occa- " ſionally collected from the maſs of the peo- " ple, to undertake an unaccuſtomed taſk, " which is to pronounce a verdict upon an in- " tricate proof."

But if the argument that has been maintained in theſe ſheets be well-founded, the propoſition here maintained, and the opinion given, will appear to be raſh, and unfit to bear much examination.

If, in the *firſt* place, it is meant that the fifteen Lords of Seſſion returned upon a ſpecial jury, would make an excellent jury, and be better able to judge of the evidence than any other, perhaps the opinion given would not be much conteſted: A ſenſe of their own rank

and character would undoubtedly ſet them above the rate of ordinary juries; although, at the ſame time, it is not admitted that mere ſkill in law conſidered by itſelf tends ſooner to bring a jury to unanimity.

But leaving that, let it be remembered, that as rotation is inherent and eſſential to the very idea of a jury, a perpetual jury of eſtabliſhed judges is a perfect contradiction in terms.

Next, if the learned Judge's opinion were to be admitted, it would extend with equal juſtice to our criminal Court, the Court of Juſticiary; for it will be obſerved, That though the propoſition is in words confined to *civil* matters, and to the Court of Seſſion, it applies equally to *criminal* matters, and to the Court of Juſticiary. The words Grand Jury ſound equally well applied to them as applied to the Court of Seſſion. They are equally trained up to the law; they are equally eſtabliſhed Judges in the daily practice of weighing evidence *in criminalibus* as the others are *in civilibus*; and if that reaſon is good in the one caſe, it is equally good in the other, "That they may undoubtedly be "more relied on for doing juſtice than the "ſame number occaſionally collected from "the maſs of the people," to undertake an unaccuſtomed taſk, which is to pronounce a verdict upon an intricate proof. Nevertheleſs, it is believed this reaſoning would hardly charm the people of Scotland to part with their juries in

in the Criminal Court for any ſet of eſtabliſhed Judges that ever exiſted. So much for the firſt general objection, That Scotland has no need of juries in civil matters.

The *next* objection is indeed a very general one, namely, "That it is ever dangerous in "judicial matters to depart from known and "eſtabliſhed modes of proceeding; and it is "impoſſible to foreſee what inconveniency "may ariſe from the change."

In anſwer to this, in the *firſt* place, This mode is not new to the law of Scotland: It has already been mentioned to have been the common mode of trial in Scotland, before the introduction of the *Old Seſſion* and of the *Daily Council.* It continued in ſome inſtances after they were introduced; was even practiſed in the preſent Court of Seſſion, in caſes of moleſtations and diſputes concerning marches; and in the ſheriff-courts remained ſtill longer in uſe: So it is not new to our law.

In the *ſecond* place, There is no reaſon why we ſhould not make trial at leaſt, of a new mode in our Civil Court, if, from the experience of our neighbours, and from our own experience in our Criminal Court, it promiſes to be a real improvement. Many alterations have been introduced into our law to its great improvement; and particularly what applies cloſe to the point in queſtion; the ancient mode of taking down evidence in writing in all criminal trials was the eſtabliſhed form of proceeding

ceeding in the Court of Juſticiary at the time of the Union; yet, for the ſake of preventing delay, and ſaving expence in the trial of offenders for crimes not capital, that mode was aboliſhed by 21ſt Geo. II. cap. 19. and t'other day, in 23d of his preſent Majeſty, an act, intitled, *For regulating the proceedings of the Court of Juſticiary*, was paſſed, ſetting forth, "That in "trials for capital crimes the method of taking "down evidence in writing had been found "to be attended with great inconveniencies, "by prolonging trials to ſuch a length as had "been found dangerous to the health of the "Judges, Counſel, and Jury, whereby the "beſt Jurymen are often deterred from attend-"ing ſuch ſervice; and thoſe who do attend, "after being exhauſted with the fatigue of "ſuch long trials, are little able to diſcharge "their duty, &c. Therefore enacted, That "it ſhould be lawful for the Judges to try e-"ven for capital crimes, without taking down "the evidence in writing."

Theſe improvements upon the forms of proceeding in the criminal law of the kingdom do honour to thoſe who deviſed them. Experience has juſtified that they are for the better adminiſtration of juſtice; and the laſt act, which was only experimental for three years, was, after experience, made perpetual by an act paſſed laſt Seſſion*, Theſe are precedents in point

* 27th Geo. 3. cap. 18.

for

for the very thing now deſired, namely, the abolition of the practice of taking down evidence in writing, which, if ſafe and for the better adminiſtration of juſtice in the criminal Court, muſt in many caſes be equally ſo in the civil one.

The *third* general objection is, That juries often are a clog upon an able and upright Judge, have in many caſes done injuſtice, and are liable to be conſtantly miſtaking the law.

It is no doubt true, that juries in time paſt have been, and will in time to come be a clog in ſome inſtances upon an able and upright Judge: But in like manner Parliaments have been, and will be in ſome inſtances, a clog upon an able and patriot King. To that inconvenience, however, we muſt ſubmit, while there is no ſecurity for perfection in individuals; and it is well to have a limiting power in juriſdiction as well as in government, leſt there ſhould occur times which we are not apt to fear, becauſe we have not experienced them.

As to juries miſtaking the law, it ought to be remembered, that the law is not the province of juries; their province is the fact, as that of the law is the province of Judges, agreeably to the rule in the law of England, formerly mentioned, which, by a great Judge in that law, is explicitly laid down to be an univerſal maxim without an exception, namely, *Ad quæſtionem facti non reſpondent*

dent judices, ad quæſtionem juris non reſpondent juratores *. In queſtions where the fact is not diſputed, the Judges determine the law, and the cauſe is never ſubmitted to the cognizance of a jury. In caſes which include diſputed facts, it is the province of the Judges to inform and direct the jury what is the law, upon the ſuppoſition of ſuch and ſuch facts: It is then the province of the jury to take the evidence of the facts, to judge of the intentions of parties, and to apply to the fact the law laid before them by the Judges. Even in criminal matters, this application of the law to the fact, and the declaring whether guilty or no, is the outſide of the power of juries, and they who carry fartheſt the prerogative of juries, have never contended, that juries have the ſmalleſt right to determine the law in civil queſtions.

In ſuch queſtions, if parties ſhall conceive themſelves to be hurt, either by the Judges miſdirecting the jury in point of law, or by the juries miſtaking the fact, or miſapplying the direction given them by the Judges, there is a remedy in the power of the Judges, who may, upon ſufficient cauſe ſhown, in their ſound diſcretion, grant a

* See Pamphlet publiſhed in 1785, intitled, *The Rights of Juries Vindicated*, &c. in the caſe of the King againſt the Dean of St Aſaph, p. 90.

ſecond

ſecond trial by another jury. This could not be ſo, if juries had a right to determine queſtions in law.

It has alſo been formerly obſerved, that it ſometimes happens, defendants omit pleading material points of law, which might have been ſufficient to acquit them, even upon ſuppoſition of the truth of the facts charged againſt them; and it matters not whether this has been done of purpoſe or by overſight. In ſuch caſes, the defendant will not be cut off by the jury's finding for the plaintiff; for he is allowed to plead a point of law or relevancy in arreſt of judgement, to the ſame effect as if he had pleaded his point by way of demurrer before the matter was ſubmitted to the jury; but it is neceſſary the circumſtances giving riſe to the objection ſhall appear on the face of the record: for an arreſt of judgement will not be admitted, like a new trial, on extrinſic circumſtances not appearing from the record itſelf; neither will it be allowed in trivial matters of form or competency, which ought to have been pleaded before joining iſſue; and this is agreeable to reaſon. To ſpeak, therefore, of the hazard to civil rights, by ignorant jurymen miſapplying or miſtaking the law, only ſhows, that they who make ſuch an objection are ignorant of the nature of jury-trial; for the Judges have full power to ſet to rights all the errors or miſtakes of juries in points of law.

The *fourth* general objection is, That at preſent we enjoy the right of appealing to the Houſe of Lords to correct the errors and miſtakes of our civil Judges. Would not juries in the moſt limited way, in ſo far put an end to theſe appeals? Shall the wiſdom of twelve jurymen be put in competition with the wiſdom and honour of the Houſe of Lords?

This objection again miſtakes the nature of jury-trial, and ſuppoſes that in civil queſtions juries may determine points of law, with which, as has been ſaid, they have no concern.

In points of law, if Judges have given a wrong judgement, upon demurrer, or upon motion for an arreſt of judgement, a writ of error, which is no other than an appeal, lies to the next ſuperior court of review. This, however, is confined to errors of the Judges upon any matter of law, ariſing upon the face of the proceedings: Indeed there is no method of reverſing an error in the determination of facts, but by a new trial, or by an attaint, formerly explained, which are the proper remedies. For ſuch a purpoſe, appeals would be moſt improper, unleſs the witneſſes were to be re-examined in preſence of the Houſe of Lords.

For illuſtrating the explanations that have been given, there may be ſubjoined here, a ſhort account of a noted caſe, in which there is an example of each of the above-mentioned ways

ways of review after verdict, namely, new trial, arreſt of judgement, and writ of error, or appeal. It is the caſe of Evelyn Sutton againſt George Johnſtone.

In the year 1781, George Johnſtone was commander-in-chief of a ſquadron of ſhips of war ſent upon a particular ſervice and expedition: Sutton commanded the Iſis, one of the ſhips. Upon the 16th April 1781, the ſquadron having proceeded to Port Praya Bay in the iſland of St Jago, was there attacked by a French ſquadron under the command of Monſ. Suffrein; and in the action the Iſis was greatly damaged. After the action, the Commodore ordered Captain Sutton to cut or ſlip his cables, and with the reſt of the fleet to purſue the enemy. This he did not obey, upon which Mr Johnſtone ſuſpended him, carried him priſoner, firſt to the Eaſt Indies, and afterwards brought him back to Great Britain, where, after two years and ſeven months had paſſed poſterior to his ſuſpenſion, he was tried by a court-martial for diſobedience of orders, and for delaying and diſcouraging the public ſervice. "That court found him not guilty of delaying "or diſcouraging the public ſervice; and that, "from circumſtances, he was juſtifiable in not "immediately cutting or ſlipping his cables, "&c.; and he was honourably acquitted."

Captain Sutton then brought an action upon the caſe, againſt Commodore Johnſtone, before

the Court of Exchequer, for damages, on account of the Commodore's having maliciouſly, and without probable cauſe, arreſted and ſuſpended him, and afterwards brought him to trial by a court-martial for diſobeying orders, and for delaying and diſcouraging the public ſervice.

Commodore Johnſtone pleaded the general iſſue, Not guilty; the caſe came before a ſpecial jury, which, after trial that laſted twenty-three hours, found for the plaintiff with L. 5000 damages.

The Commodore applied to the Court for a new trial, alledging, that the jury had miſtaken the caſe, in ſo far as there was no ground for charging him with malice. The four Judges were all clear of opinion, that no malice had been proved; and therefore, they awarded a new trial. In this ſecond trial the defendant again pleaded the general iſſue. The ſecond jury found for the plaintiff L. 6000 damages.

After this, Commodore Johnſtone, in Hilary term 1785, made a motion in the ſaid Court, for the plaintiff to ſhow cauſe why judgement on the ſecond verdict ſhould not be arreſted? The chief reaſons inſiſted upon for Mr Johnſtone were, " That this queſtion was not cogniſable in a court of law; inſomuch as the ſuppoſed offences were committed by him as commander-in-chief of a ſquadron of ſhips of war in the due courſe of diſcipline, while Captain

tain Sutton was ſerving as an officer under his command; and therefore the queſtion, Whether he was guilty of an oppreſſion againſt Sutton? was only cogniſable in a military court. 2*dly*, That the damages had been aſſeſſed for all of the ſaid ſuppoſed offences in the declaration, although Mr Johnſtone had *reaſonable* and *probable* cauſe to arreſt, ſuſpend, and bring Captain Sutton to trial." After ſolemn argument upon theſe and other topics, the Court diſcharged the rule, and confirmed the verdict.

Commodore Johnſtone then brought a writ of error in the *Exchequer Chamber*, as the next ſuperior court of review, and among others, ſpecially aſſigned the reaſons above mentioned, as proving errors in the proceedings of the *Court of Exchequer*.

By a reference from the Lord Chancellor, the cauſe was argued before Lord Mansfield and Lord Loughborough, who reported their opinion, which, (according to a printed account thereof,) was in ſubſtance, 1*mo*, That it was a doubtful point, Whether action lay at Captain Sutton's inſtance againſt Commodore Johnſtone in the civil court? 2*do*, That ſuppoſing action did lie, they were both clear that Commodore Johnſtone had, in law, a *probable cauſe* for arreſting and ſuſpending Captain Sutton.

Upon this report to the Lord Chancellor, the judgement of the Barons was reverſed in the *Exchequer Chamber*.

A writ of error was afterwards brought in the Houſe of Lords by Captain Sutton plaintiff, which being heard at the bar of that Houſe, where the Judges attended to give their opinion; and after ſome debate, the queſtion being put, that the decree be affirmed, the judgement of the Exchequer Chamber was affirmed *.

So much for the methods of review in England after verdict; and the whole may be cloſed with this remark, That inſtances of wilful injuſtice or partiality in juries are very uncommon in civil caſes: Such inſtances are moſtly in the criminal or revenue courts, and are generally on the ſide of liberty or mercy, or for the ſubject. This and the whole other objections, therefore, if they avail any thing, go too far; for they go to aboliſh jury-proceſs in the criminal and revenue law. Were ſuch a propoſal directly made, what would the whole kingdom ſay?

Theſe appear to be moſt of the general objections againſt jury-trial: They contain nothing of weight, were the plan propoſed more extenſive than it is; but as applied to the plan in its limited ſhape, they vaniſh into nothing.

It may be farther objected, in the *fifth* place, in particular, That nothing is propoſed with regard to Sheriff-courts, or other inferior courts:

* The account of this caſe is taken from a pamphlet, intitled, "Conſiderations on the Queſtions lately agitated in Weſtminſter-"Hall," &c. and other papers in print.

Is not a jury ſtill more requiſite where there is only a ſingle judge, and an inferior one too, than in the Court of Seſſion, compoſed of the fifteen Supreme Judges? And if ſheriffs are to have juries, is a whole county to be aſſembled for taking proofs in a ſheriff-court?

At firſt view, theſe appear to be ſtrong queſtions; but let them be coolly examined.

In the *firſt* place, If the reformation be fit and expedient in the Court of Seſſion, it ought to be made there without reſpect to what is fit or not fit, to what is done or not done, in the inferior courts. They who think juries inexpedient in inferior courts, cannot object to let them remain as they are, whatever be thought fit to be done in the Court of Seſſion: Or, independent of what is done in the Court of Seſſion, to admit of ſuch alterations in the ſheriff-courts as may be demonſtrated to be improvements.

In the *ſecond* place, Upon the ſuppoſition, that trials of any great conſequence were to proceed and be finally determined before the ſheriff-courts, reformation there, in the manner of taking proofs, would, upon due attention, appear ſtill more requiſite than in the Court of Seſſion. In theſe courts there is but a ſingle judge; and what if it ſhould appear, that this ſingle judge ſeldom or never takes the evidence of the witneſſes in his own preſence, but remits it uniformly to the clerk of court; and the clerk perhaps leaves it to his deputies,

deputies, or to the procurators for the parties? And oftentimes it is remitted to commiſſioners named by the parties. Upon proofs taken in this manner, the deciſion of cauſes depends!

Formerly ſheriffs took every proof themſelves, and determined every cauſe of any conſequence by jury only; and this practice continued long after jury-trial was laid aſide in the Supreme Court. In evidence of this, the author of the Law Tracts above mentioned refers to the public records for a book of the ſheriff-court of Orkney, beginning 3d July 1602, and ending 29th Auguſt 1604, in which book the whole proceſſes recorded and ingroſſed, civil as well as criminal, appear to have been tried by juries.

In caſes of importance, this practice might certainly be revived without bringing the whole county together. In ſmaller cauſes, other reformations might be introduced with great advantage to the ſheriff-courts. As, for inſtance, after the example of ſome of the town-courts in Royal Boroughs, called the Ten-merk Courts, all cauſes, under the value of ten merks Scots, are tried ſummarily. The purſuer produces a perſonal execution of citation in three lines, by an officer; and if the defender appear, he is heard, and the purſuer is heard in turn; and the witneſſes produced are ſworn. Nothing is taken down in writing: no procurator appears: If the defender does

does not appear, he is held as confeſſing: The decree is annexed, in three lines, to the execution of citation; and if againſt the defender, it contains a ſummary warrant for impriſoning his perſon, and poinding his goods, for payment of the ſum awarded, and for the expences, which ſeldom exceed 4d. Sterling. Frequently thirty or forty of theſe cauſes are decided in one forenoon.

It is eaſy to conceive what an advantage it would be to ſubſtitute this mode of trial in place of the long, tedious, and expenſive litigations which poor people are ſometimes drawn into in ſheriff-courts, under the preſent forms of committing every thing to writing, and carrying all into the ſuperior Courts.

But the ſheriff-courts are not *hujus loci*; they may ſtand for farther conſideration till the trial herein propoſed for the Court of Seſſion be made. Sheriff-courts are not competent to competitions of real rights, that is, queſtions concerning the rights of immoveables, nor to reductions, nor to forgeries: Frauds of any importance are ſeldom brought before them, even in the firſt inſtance: and although queſtions in commercial contracts, or concerning moveables, or perſonal rights of the greateſt amount, may be tried in ſheriff-courts in the firſt inſtance; yet all ſuch cauſes of any importance, begun there, generally land in the Supreme Court, in the ſecond inſtance. The regulation of ſheriff-courts therefore has no

neceſſary connection with the preſent queſtion.

Theſe are all the objections, general or particular, weighty or frivolous, that have occurred in conſidering the plan propoſed. If there are others, it were well, in ſo weighty and important a queſtion, to ſpeak them fully out; and it is hoped that this Eſſay may draw them forth.

No human inſtitutions are perfect: all of them have defects; and it is the buſineſs of wiſe men to chuſe ſuch ſyſtems as are attended with the ſmalleſt number. And this leads to mention, That

Sir William Blackſtone, in the concluſion of his chapter above referred to, concerning jury-trial *, takes notice, That the beſt and moſt effectual method for preſerving and extending the trial by jury in practice, is to endeavour the removal of all its defects, as well as to improve its advantages. And he ſtates the principal defects to be theſe:

" *Firſt*, The want of a complete diſcovery " by the oath of the parties. This each of " them is now intitled to have, by going " through the expence and circuity of a court " of equity; and therefore it is ſometimes had " by conſent, even in the courts of law," &c.

But this defect is already ſupplied in the law of Scotland, by which the oath of party can be compelled in every caſe. This is a

* Vol. 3. p. 381.

ſpecies

ſpecies of evidence ſo well founded in reaſon and in juſtice, that there ſeems to be no occaſion for ſetting a jury in caſes where the party confeſſes "the fact upon oath:" *In confitentem reum nullæ ſunt partes judicis.*

This cuts off from jury-trial the whole claſs of caſes where the matter is referred to the oath of party.

The ſecond defect ſtated by Sir William, is of a nature ſomewhat ſimilar to the firſt: "The want of a compulſive power for the "production of books and papers belonging "to the parties." He means, where ſuch books and papers are in the hands of the parties themſelves.

Neither does this defect ſubſiſt in the law of Scotland: By that law, the Civil Law maxim of, *Nemo tenetur edere inſtrumenta contra ſe*, is carried no farther than, that no man is obliged to throw open his charter-cheſt, or repoſitories, *in general*, to his adverſary, for the fiſhing out objections to his right and title-deeds, or for the purpoſe of deſtroying his rights; yet every man is obliged, at the inſtance of his adverſary, to produce any deed or writing that is particulariſed by its date or name; and merchants are obliged to produce all thoſe parts of their account-books which contain any entries relative to the particular matters in iſſue.

He mentions a third defect, namely, "The "want of power to examine witneſſes abroad,

" and to receive their depoſitions in writing " where the witneſſes reſide, and eſpecially " when the cauſe of action ariſes in a foreign " country. To which may be added, the pow- " er of examining witneſſes that are aged or " are going abroad, upon interrogatories *de* " *bene eſſe*, to be read in evidence, if the trial " ſhould be deferred till after their death or " departure."

Neither does this defect exiſt in the law of Scotland, where it is the conſtant practice to take evidence in that manner.

In England, theſe defects in the common law would amount to the making of buſineſs inextricable by juries, were it not for the remedies that are obtained in each of them by means of the Court of Chancery. But in the firſt place, as has been ſaid, none of them exiſt in the law of Scotland. There is alſo in the Court of Seſſion what is called an *officium nobile*, being no other than a Chancery power of ſupplying the defects of the common law.

To theſe defects mentioned by Sir William Blackſtone may be added a fourth which he does not mention: It would ſeem rather an objection to the Engliſh method, than a defect in it, and it is this: By the law of England, writings, be they ever ſo ſolemnly executed, are not probative *per ſe* till after thirty years: If they are produced in evidence, living witneſſes muſt be brought before the jury to prove the execution or hand-writing.

This

This would ſeem to be a very great inconvenience without any manner of neceſſity: For in Scotland, we find the faith of written evidence is perfectly well ſecured by the ſolemnities requiſite for the execution of all writings of importance, and that even, bills of exchange, notes of hand, miſſive letters, and the like, are as little liable to forgery as in England, the more eſpecially, as in Scotland, the uttering or making uſe of a falſe writing, knowing it to be ſuch, is equally criminal as forgery.

It may alſo be obſerved, that evidence in writing is in itſelf ſimple, and where difficulties lie in the ſolemnities of execution, they ſeem to be matters of law rather than of fact; and therefore more fit for the cogniſance of eſtabliſhed Judges than of a jury: This cuts off the need of jury-trial in every caſe depending upon evidence in writing: It is unneceſſary alſo in cauſes that come before the Court as a Court of Chancery; alſo in judicial ſales and ſuch like, where there is no reaſon to ſuſpect witneſſes. And in ſhort, it is propoſed to reſtrict jury-trial to caſes where ſome important intereſts, and where the paſſions of men are concerned. The numbers would be few, yet the plan would procure great relief to the Judges, and a ſaving of much time and expence to all perſons who have the misfortune to have lawſuits of the kind deſcribed.

By way of concluding objection, it is ſaid, that this alteration in the moſt limited view cannot

cannot now be obtained without the aid of Parliament; which is certainly true; and it is added, that ſuppoſing ſome plauſibility for making the experiment propoſed, that yet it is a delicate matter to bring the conſtitution of our Court into Parliament; once there, ſay the objectors, who knows what Parliament may do with us; better to bear ſome inconveniencies, than truſt the conſtitution of our Courts to the handling of Parliament.

In this way of hinting dangers without expreſſing them, of heſitating diſlike, without giving any explanation, there is a myſtery difficult to be unravelled. What reaſon is there to diſtruſt the wiſdom of Parliament? Is it becauſe after the Rebellion 1745 they aboliſhed the heritable juriſdictions, and gave Scotland L. 152,000 Sterling for them? Is it becauſe they took away the ward-holdings, and allowed the caſualties to be purchaſed for a price? or is it becauſe, in the trial of crimes not capital, they aboliſhed the practice of taking down evidence in writing? or that lately this abolition was alſo extended to capital caſes?—The Court of Juſticiary entruſted themſelves in theſe particulars to the wiſdom of Parliament: Why ſhould it be feared the Court of Seſſion will be worſe treated?—Parliament has lately been kind to both Courts in increaſing their ſalaries, what reaſon is there to fear from Parliament any hurt to their conſtitution? Surmiſes of that kind thrown out without precedent, and even without

without explanation, will undoubtedly be conſtrued to proceed from motives that cannot with decency be ſpoken out.

Upon the whole, it is hoped theſe maxims have been eſtabliſhed, *Firſt*, That to obtain juſtice is the ſole end of legal trials: That without finding out truth, juſtice cannot be obtained: That to find out truth is the ſole object of taking evidence: That the beſt manner of taking evidence is in preſence of the Court which is to judge of it: That a Court is beſt compoſed of eſtabliſhed Judges to decide the law, and of juries to try the fact: That in Great Britain, including both kingdoms, jury-trial is the palladium of liberty in criminal matters; and in England, the ſecurity of property and of reputation in civil matters; and that for theſe reaſons, in civil queſtions of great importance, Scotland is alſo intitled to a revival of this their native and ancient privilege.

CHAP.

CHAP. IV.

Containing, in one view, a ſummary of the Propoſals ſuggeſted in the preceding Chapters, and of ſome Regulations neceſſary for their better execution.

1*mo*, THAT from and after the day of the Court of Seſſion ſhall be divided into two Chambers: The firſt to conſiſt of the Lord Preſident, and five at leaſt of the Ordinary Lords of Seſſion who are not Commiſſioners of Juſticiary, and to be called the Chamber of Seſſion: The ſecond to conſiſt of the Lord Juſtice-Clerk, and the five Lords of Seſſion who are alſo Commiſſioners of Juſticiary; the Juſtice-Clerk to preſide; and this Chamber to be called the Chamber of Juſticiary.

2*do*, That the remaining Lords of Seſſion, in caſe they are diſabled by old age or infirmities, and ſhall obtain leave from his Majeſty for that effect, be relieved from the duty of their office, but retain their rank and ſalaries during life.

3*tio*, That the Chamber of Seſſion, of whom three to be a quorum, ſhall have all the powers and

and juriſdictions in matters of law or equity that are competent to the preſent Court of Seſſion; and their decrees to have the ſame force and authority, and not to be liable to review by the whole Court, or otherwiſe than by appeal to the Houſe of Lords.

4*to*, That the Chamber of Juſticiary be equally a ſupreme Court, and their decrees to have the like force and effect as thoſe of the firſt Chamber; their juriſdiction to extend to every matter of common and ſtatute law; and particularly, that they preſide in jury-trials, in caſe it ſhall be thought expedient to revive that mode in certain civil cauſes, as after mentioned. The laſt ſeven days of each Seſſion to be ſet apart for ſuch jury-trials as the Court may order to proceed in the city of Edinburgh; any three of this Chamber to make a quorum; providing always, That in the caſe of jury-trials any one of their number ſhall be ſufficient: That they ſhall be relieved of judging in certain of the cauſes called Concluded Cauſes, when the evidence is taken down in writing; or, in ſome other ſhape, have ſome reaſonable compenſation of relief for the additional trouble they may get by jury-trials.

5*to*, That in nice and new points of law it ſhall be competent for either of the Chambers, in their diſcretion, to order ſhort caſes to be made up, for being heard, argued, or otherwiſe adviſed by the whole Twelve Judges, who ſhall meet occaſionally, or at ſtated times, for that

purpoſe, or for ſuch buſineſs as may be thought expedient to reſerve to them.

6*to*, That in all cauſes not exceeding L. 12 in value, the decree of any one of the Judges, whether in the Bill-Chamber or in the Outer Houſe, ſhall be final and concluſive, to all intents and purpoſes whatſoever.

7*mo*, That in all actions, concluding for reduction or reſtitution, or for damages or diſabilities, on the head of fraud or injury, or in other cauſes of great importance or perplexity, brought before the Court of Seſſion, when the evidence depends on parole-teſtimony, it ſhall be lawful for the ſaid Court, if they ſee fit, to make and iſſue an act or order for appointing the trial to be by jury; ſuch jury to conſiſt of not fewer than nine, and not more than thirteen perſons.

8*vo*, That the granting or not granting trial after this mode in any cauſe, ſhall be entirely in the diſcretion of the Court.

9*no*, That where theſe cauſes ſhall ariſe within the ſhires of Edinburgh, Linlithgow, or Haddington, (which are not comprehended in any of the circuits), the trials ſhall proceed in Edinburgh at ſittings in the laſt ſeven days of the ſummer, and laſt ſeven days of the winter ſeſſion; and when they ariſe within any of the other counties in Scotland, they ſhall be tried at the Circuits, without prejudice to the Court to order trials at other places, if they ſee fit.

10*mo*, * That the ſheriffs and ſtewarts of the ſeveral ſhires and ſtewartries in Scotland ſhall each make up annually a book or liſt of all free and lawful men, within their reſpective ſheriffdoms or ſtewartries, qualified to be jurors, viz. of all heritors having eſtates of land, or other hereditaments, of the clear yearly value L. 10, or leaſe-holders, having leaſes of ſuch lands or hereditaments for twenty-one years, or for a life or lives, of the clear yearly value of L. 20, over and above the reſerved rent; and of all perſons having real or perſonal eſtates of the value of L. 200.

11*mo*, That at the trials, the names of the jurors ſhall be put in a box, and ſhall be drawn from thence till a number be made up, conſiſting of not fewer than nine, and not more than thirteen; the whole to be ſworn one by one, "That they ſhall well and truly try the "iſſue between the parties, and true verdict "give according to the evidence;" reſerving to the parties all lawful challenges and exceptions.

12*mo*, That in all cauſes where the Court ſhall order the trial to be by jury, it ſhall be lawful for either of the parties to apply for a ſpecial jury, providing ſuch party be bound

* Moſt of the following articles are borrowed from acts of parliament lately made for the improvement of jury-trial in England, particularly 3d Geo. II. cap. 25. intitled, *For the better regulation of Juries;* and 24th Geo. II. cap. 18. intitled, *For the better regulation of Trials by Jury.*

to advance the expence of the jury, if the court ſhall ſo order, reſerving his claim for relief from the other party, in caſe of his prevailing in the cauſe.

13*tio*, That in all cauſes where ſpecial juries are ordered, the Court ſhall iſſue a writ to the ſheriff or ſtewart, directing him to produce to the parties or their agents, their ſaid book or liſt; from which book there ſhall be taken indifferently the names of forty-eight perſons, and to ſummon twenty-four of theſe perſons ſelected, as after mentioned, "being all free and lawful men, of kin to neither of the parties, and by whom the truth of the matter may be beſt known, to attend at ſuch time and place as the Court ſhall direct, in order to paſs upon the aſſize in the cauſe between the parties, under the pain of forfeiting each man L. 5 for default, without lawful excuſe."

14*tio*, For making up the ſaid liſt of twenty-four jurors, it ſhall be lawful for the parties or their agents, to ſtrike one man alternately from the ſaid liſt of forty-eight, till the number be reduced to twenty-four; or failing their ſo ſtriking out, it ſhall be lawful for the ſheriff or ſtewart to act for the party or parties abſent, and ſtrike out till the number be reduced to ſaid number of twenty-four.

15*to*, That in caſe it ſhall appear neceſſary or proper, that before the trial, the jury, or part of them, ſhould have a view of the lands or other matters in debate, then it ſhall be lawful

ful for any of the Judges of the Court where the cauſe is depending, or before whom the cauſe is to be tried, upon application of both or either of the parties, to name ſix at leaſt of the ſaid twenty-four jurors, on the ſuggeſtion of the parties or their agents on both ſides, or of his own choice, for the party failing to ſuggeſt, to meet all together, attended by the parties or their agents, to take a previous view of the lands or other matters in debate, the party or parties applying for ſuch view advancing the expence thereof, as the ſame ſhall be modified by the ſaid Judge; and ſuch jurors who have appeared at the view, ſhall be firſt ſworn of the jury.

16*to*, That at the trial, the names of theſe twenty-four jurors (other than thoſe who have appeared upon the view, if any) ſhall be put into a box, and ſhall be drawn from thence till the above-mentioned number be made up, including thoſe who appeared at the view, the whole to be ſworn as above directed; and reſerving to the parties all lawful challenges and exceptions.

17*mo*, That if by default of jurors appearing, or by means of objections, a ſufficient number ſhall not be left for the trial, the number ſhall be made up of ſuch like jurors *ex circumſtantibus* by the Court.

18*vo*, That the trial ſhall be taken, either at the bar in preſence of the Court, or before any one or more of their number, as the Court ſhall direct.

19*no*,

19*no*, That in all jury-trials, the evidence ſhall be taken publicly in preſence of the Court and jury, and of the parties, or thoſe employed for them, and ſhall proceed upon the interrogatories of the counſel for the parties, but ſhall not be taken down in writing, according to the preſent mode of taking evidence, which practice ſhall be laid aſide and aboliſhed for ever, in all cauſes where the trial ſhall be by jury.

20*mo*, That at the trial only two counſel ſhall ſpeak of a ſide before taking the evidence produced for the purſuer, and two before taking the evidence for the defender, with liberty, after concluding the defender's evidence, for one of the purſuer's counſel to reply; after which, one of the Judges, or the Judge preſiding, ſhall ſum up the evidence to the jury.

21*mo*, The jury ſhall have no communication with any perſon during the trial; and immediately after the evidence is ſummed up to them, they ſhall be incloſed by themſelves, and ſhall have no communication with any perſon, other than one of the clerks of Court, or their deputies; nor ſhall they ſeparate until their verdict be returned by their foreman to the Court, in their preſence, either verbally or in writing, and be entered on the record by the clerk of Court.

22*do*, Providing always, That when the jury can agree inſtantly, it ſhall be lawful for them by their foreman, to return their verdict without going out of Court.

23*tio*,

23*tio*, That the ſheriff, or ſtewart, or jury, failing in any point of duty in the premiſſes, ſhall be liable to like penalties or cenſure as they would be by the law of Scotland for ſuch like default or neglect of duty in the Court of Juſticiary.

24*to*, If, in any point of law concerning the admitting or denying of evidence, or concerning a challenge, or ariſing upon facts not denied, either party ſhall conceive the deciſion or direction of the Judge to be erroneous, ſuch party may except to the ſame, and ſtate his exception in a minute in writing, to be made up at the time, and immediately preſented to the Judge, to be authenticated by his ſubſcription, and made part of the record.

25*to*, That in all caſes where parties ſhall conceive themſelves to be aggrieved by the verdict of the jury, or by the miſdirection of the Judge, it ſhall be competent to the Court, for good cauſes ſhown, to award a new trial, by another jury, in the ſame manner as by the firſt jury; and it ſhall alſo be competent for parties conceiving themſelves aggrieved by the judgement of the Court, upon points of law, whether before or after verdict, (the ground of the objection always appearing upon the face of the record), to move for a rehearing and arreſt of judgement, and to take their appeal againſt the final judgement of the Court to the Houſe of Lords, in the ſame manner as is at preſent competent in civil cauſes.

26*to*, And whereas the act of the 11th parliament

liament of James VI. cap. 22. in 1587, intitled, "That actions of moleſtation and others, poſ-"ſeſſors, ſhould be decided before the inferior "Judges," ſets forth, That the great number of ſuch actions brought before the Lords of Seſſion, greatly impedes the ordinary courſe of juſtice in weighty cauſes of heritage, and other matters of great importance, moſt proper to be decided by the ſaid Lords, and therefore directs that ſuch actions of moleſtation ſhould be remitted, as accuſtomed of old to be tried, by the ſheriffs of ſhires, ſtewarts of ſtewartries, bailies of regalities, and others, ordinary judges where the land lies, by the determination of an aſſize, in manner therein directed; and whereas the ſaid act has not been found ſufficient to anſwer the good intent thereof, and has fallen into diſuſe, it is propoſed that the ſame be repealed, and that in lieu thereof, all actions of moleſtation, which are merely poſſeſſory, ſhall be determined by jury-trial before the ſheriff of the county, or ſtewart of the ſtewartry, where the lands lie, in the ſame manner and under like regulations as herein before directed with regard to trials of cauſes of importance before the Court of Seſſion.

27*mo*, Providing always, That where actions of declarator of property, or for diviſion of commonties are joined with ſuch actions of moleſtation, the Lords of Seſſion, in either of the ſaid Chambers, after ſettling all queſtions of relevancy, or competency, or other queſtions

of

of law, ſo far as the ſame can be previouſly ſettled, may remit the cauſe to the reſpective ſheriffs or ſtewarts, to try by jury the nature, extent, and time of the poſſeſſion had by the ſeveral parties, and of the truth of the material facts; and either to find for the parties according to the evidence, or to return a ſpecial verdict, to be reported to the Court from whence the remit was made, as they ſhall have been directed by the ſaid Court.

28*vo*, That it ſhall be lawful for the ſaid Court of Seſſion to make one or more act or acts of ſederunt for the carrying the ſaid regulations into execution.

29*no*, That an application be made to Parliament for an act containing ſuch of the above, or other regulations, as ſhall be thought fit to remedy the evils complained of.

F I N I S.

E R R A T A.

P. 64. *line* 24. *after* demurrer, *add* to the declaration,

P. 66. *line* 24. *after the word* common: *delete four lines, beginning with the word* Special *and ending with the word* now, *and in their place inſert the word* and

P. 68. *line* 7. *delete* ſuſpicion, *and inſert* partiality;

P. 68. *line* 8. *delete* ſuſpicion *and inſert* ground

P. 75. *line* 23. *delete* a ſhilling *and inſert* eight pence